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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 254

DIXIE PORTLAND FLOUR MILLS, INC.,
Petitioner,

vs.

STANIFER G. BYRD,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Tennessee,
Eastern Section.

GEORGE P. BOWIE,
901 Washington Avenue,
St. Louis, Missouri 63178,
Attorney for Petitioner.

Of Counsel:
JOHN S. CARRIGER,
Maclellan Building,
Chattanooga, Tennessee 37402,
JOHN D. SCHNEIDER,
615 N. Ninth Street,
St. Louis, Missouri 63101.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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PETITION FOR WRIT OF CERTIORARI

To the Court of Appeals of Tennessee, Eastern Section.

Dixie Portland Flour Mills, Inc., prays that a writ of certiorari be issued to review a judgment entered on August 28, 1963, by the Court of Appeals of Tennessee, Eastern Section, in the above-entitled case.

OPINIONS BELOW.

The opinion of the Circuit Court of Hamilton County, Tennessee, is unreported. A copy of the opinion is attached to this petition as Exhibit A of Appendix B to the petition (infra, p. 23). The opinion of the Court of Appeals of Tennessee, Eastern Section, is unreported. A copy of this opinion is attached to this petition as Exhibit B of Appendix B to the petition (infra, p. 32). The opinion of the Court of Appeals of Tennessee, Eastern

Section, on the Petition to Rehear is unreported. A copy of this opinion is attached to this petition as Exhibit C of Appendix B to the petition (infra, p. 48).

JURISDICTION TO REVIEW.

The date of the judgment of the Court of Appeals of Tennessee, Eastern Section, sought to be reviewed is August 28, 1963 (Exhibit D of Appendix B to the petition, infra, p. 51). Its date of entry as a final judgment was September 27, 1963 (Exhibit E of Appendix B to the petition, infra, p. 54). A timely Petition for Rehearing was denied on September 27, 1963 (R. 1281).[1] On March 5, 1964, Petition for Writ of Certiorari to the Supreme Court of Tennessee was denied (R. 1346). On April 8, 1964, Petition for Rehearing was denied by the Supreme Court of Tennessee (R. 1352). On May 8, 1964, Application for Special Leave to File a Second Petition for Rehearing, Second Petition for Rehearing attached thereto, was denied by the Supreme Court of Tennessee (R. 1368).

The jurisdiction of this Court is invoked under Section 1257 (3) of Title 28, U. S. C., arising under the Act of June 25, 1948, C. 646, 62 Stat. 929, the pertinent provisions of which are:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where any title, right, privilege, or immunity is specially set up or claimed under the Constitution • • • of • • • the United States."

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[1] Record references "R." refer to the folios in the Record which include the proceedings before the Trial Court, the Court of Appeals, Eastern Section, and the Supreme Court of Tennessee.

QUESTIONS PRESENTED.

1. Does a state appellate court judgment which is based upon an instruction which directed the jury to find that the petitioner was principal and master of a co-defendant if the jury found that said co-defendant was "acting under their (petitioner's) instructions in any manner" deprive petitioner of its property without due process of law (guaranteed under Section 1 of the Fourteenth Amendment to the Constitution of the United States) where, under the undisputed evidence, the co-defendant negligently backed a truck into petitioner's private wall knocking it over and injuring plaintiff, and said co-defendant was a complete stranger to, and not subject to any control or direction by, petitioner; for the reason that, there is absolutely no legal basis for so establishing a master and servant relationship in the recorded jurisprudence of this country and to so rule constitutes a radical and capricious departure from, and is in direct conflict with, the fundamental principles of jurisprudence which have been universally established for the protection of private rights?

2. Where the *only* method of reviewing errors of a state court of appeals is by the discretionary writ of certiorari, and the highest court of that state denies certiorari to review properly asserted federal questions [arising for the first time in the state court of appeals], has not the petitioner been denied due process of law and is it not the absolute duty of this Court to take jurisdiction to prevent a litigant's properly asserted federal constitutional rights from being abridged through the absence of a right of review by any court, state or federal?

3. Where there was absolutely no dispute by any of the parties as to the "way and manner" in which the accident occurred, and the jury were instructed that if

they found that the accident occurred in the "way and manner" in which the plaintiff insisted then all defendants were guilty of negligence (the law of Tennessee being directly to the contrary, "that negligence is never presumed from the mere happening of an accident")[2] and their verdict would be for the plaintiff against all defendants, did the petitioner receive a trial in accordance with the settled course of judicial proceedings in Tennessee so as to prevent its property from being taken without due process of law?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

1. Constitution of the United States, Amendment XIV, Section 1, Appendix A, p. 21.

2. Constitution of Tennessee, Article 1, Section 6, Appendix A, p. 21.

3. Constitution of Tennessee, Article 1, Section 8, Appendix A, p. 21.

4. Constitution of Tennessee, Article 1, Section 17, Appendix A, p. 22.

5. Tennessee Code Annotated, Section 27-819, Appendix A, p. 22.

STATEMENT.

This case involves an action for damages by Stanifer G. Byrd against the Dixie Feed and Seed Company, their employee, James Lee Johnson, and your petitioner, the Dixie Portland Flour Mill, and other defendants (R. 15).

Petitioner occupied certain premises fronting along King Street in the City of Chattanooga which were used to

[2] City of Knoxville, Tenn. v. Bailey, 222 F. 2d 520 at 529.

receive and warehouse grain used in its manufacturing processes. Certain of the area fronting on King Street was enclosed with a concrete block wall erected prior to the occupancy of the premises by petitioner. This wall abutted the sidewalk on King Street and enclosed in the area of the premises used by customers as a waiting or parking area until the scales and dock space were available for the weighing and unloading of their trucks (R. 582).

On July 11, 1960, the defendant Johnson, an employee of Dixie Feed and Seed Company, entered the premises with a tractor-trailer loaded with grain (R. 1043-1044). He proceeded to the parking area that had been indicated to him several months before by a dock foreman of your petitioner as the area used by all customer-invitees (R. 582). On the date of the accident no directives were given to Johnson concerning the parking of his truck. At no time did Johnson receive any instructions concerning the manner in which the truck should be parked or driven while on petitioner's lot (R. 582).

Johnson backed the trailer truck to a stop with the rear end twelve to eighteen inches from the concrete block wall along King Street. While in that position, without setting the brakes and with the motor still turning, although the ignition was turned off, he removed his foot from the clutch while the tractor unit was in reverse gear. The entire unit jumped backwards striking the wall with sufficient force to demolish a portion thereof (R. 1044). The evidence showed that the truck weighed in excess of thirty tons (R. 585). This impact caused the concrete blocks to be propelled onto the sidewalk and into the street, some of which struck the plaintiff who was passing along the sidewalk adjacent to the wall at the point of impact (R. 364, 457). The speed of the unit at the time of the impact was not shown.

Sometime prior to the occurrence, petitioner had removed a shed roof that covered the parking area. Plaintiff alleged that in so doing the wall was weakened (R. 1012). There was no evidence that the wall would have withstood the force of a thirty ton impact if the roof had remained or the wall was differently constructed. There was evidence, uncontradicted by any of the experts who testified, that the blow would have knocked down "any wall that you would put up there" (R. 1027).

The trial court presented the case to the jury on all counts of the complaint which included, inter alia, the following verdict directing instruction:

> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence and if you find that if the co-defendant, Dixie Portland Flour Mills, Inc., was his principal at the time, that is, *that he was acting under their instructions in any manner*, then that would create agency and in that event you could predicate the liability of Dixie Portland Flour Mills upon the negligence of James Lee Johnson provided you find that Johnson was, at the time of this accident, the agent of Dixie Portland Flour Mills, Incorporated" (Added emphasis) (R. 1132).

The "way and manner" in which the accident happened is as described above, which was undisputed and uncontested by any party litigant. In fact, there was unanimous agreement as to the "way and manner" in which the accident occurred.

The court gave the following verdict directing instruction:

> "However, the court instructs you that if you believe the theory and insistence of the plaintiff as to the way and manner in which this accident occurred to be true from all of the proof as to all

of the defendants, that is, by the preponderance of the evidence according to the definition of that term which I have already given you, then the defendants would be guilty of negligence and your verdict would be in favor of the plaintiff against all of the defendants" (R. 1127).

The jury returned a verdict for $380,000.00 against the Dixie Feed and Seed Company, their driver, Johnson, and your petitioner. On appeal, a remittitur of $90,000.00 was suggested by the appellate court and accepted by plaintiff and final judgment was recorded in the Court of Appeals of Tennessee, Eastern Section in the amount of $290,000.00. To prevent execution, writ of execution having been issued, petitioner satisfied the judgment. Contribution and indemnity were refused by the other defendants by virtue of their having invoked the jurisdiction of this Court under 28 U. S. C. 1257 (2), as contained in their notice of appeal to this Court (R. 1369-70-71).

HOW FEDERAL QUESTION IS PRESENTED.

All issues raised by the first and third Questions Presented involve an unwarranted departure from the controlling state decisions to the extent that no prior cases in Tennessee permitted recovery under the law given by the trial court to the jury and petitioner had no basis for believing that the Court of Appeals of Tennessee would affirm the judgment of the trial court and in so doing enter its own judgment in clear conflict with fundamental concepts of jurisprudence. Therefore, the issues here raised were cited in the motion for new trial (Appendix C, infra, p. 55; R. 130, 165, 149, 150) and in the assignments of errors to the Court of Appeals (Appendix C, infra, p. 56; R. 130, 165, 149, 150) only

in terms of local law. The genesis of the denial of the petitioner's federal constitutional rights was embodied in the judgment of the Court of Appeals of Tennessee in permitting the petitioner's property to be taken without due process of law.

Thereafter, petitioner filed a timely petition for writ of certiorari in the Supreme Court of Tennessee[3] which specifically raised denial of his federal constitutional rights upon the issues contained in the first and third Questions Presented (Appendix C, infra, p. 58; R. 1296, 1297, 1299, 1300, 1301, 1302, 1305, 1314, 1315, 1316, 1339, 1340, 1341, 1342); Petition for certiorari was denied; Petition for rehearing was timely filed and, again, the attention of the Supreme Court of Tennessee was called to the denial of petitioner's federal constitutional rights as set out in the petition for certiorari and further suggesting, including the citation of Tennessee cases on the issue, that the Supreme Court of Tennessee was exclusively vested with jurisdiction to decide both state and federal constitutional questions (Appendix C, infra, pp. 68; R. 1348 to 1350); Application for special leave to file a second petition for rehearing, with petition attached, was timely filed, and for a third time the attention of the court was drawn to a violation of the petitioner's federal constitutional rights (Appendix C, infra, p. 72; R. 1353, 1354, 1355 to 1361); this, too, was denied. This exhausted petitioner's remedy in the state

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[3] The following Tennessee cases are authority for raising constitutional questions for the first time on petition for writ of certiorari to the Supreme Court of Tennessee. Langford v. Vanderbilt University, 199 Tenn. 389; 287 S. W. 2d 32, 39, holding: "In addition, the constitutional invalidity of a statute invoked in a suit will be considered by the appellate courts when the question is made without regard to whether that insistence was, or not, raised in the lower court"; Powers v. McKenzie, 90 Tenn. 177, 16 S. W. 559; City of Elizabethton v. Carter County, 204 Tenn. 452, 321 S. W. 2d 822; Razier v. Elmore, 180 Tenn. 232, 173 S. W. 2d 563.

courts and gave rise to petitioner's second Question Presented.

This petition seeks a writ of certiorari addressed to the Court of Appeals of Tennessee, Eastern Section, rather than the Supreme Court of Tennessee because under Tennessee appellate procedure, the respective courts of appeal have jurisdiction over the enforcement of their own judgments and unless that judgment is modified or reversed by the Supreme Court of Tennessee, it becomes the final judgment in the case.

Petitioner filed petition for stay of execution, amended to include tender of supersedeas bond, of the judgment of the Court of Appeals of Tennessee (Appendix C, infra, p. 80, Vol. XI, Supplement to R. 1, 2). Hearings scheduled before the Court of Appeals with respect to action on the petition for stay of execution were successively continued pending decision of the Supreme Court of Tennessee on petitioner's application for special leave to file second petition for rehearing. The Court of Appeals had before it for consideration, in conjunction with the petition for stay of execution, the petition for certiorari filed in the Supreme Court of Tennessee (Appendix C, infra) and a copy of petitioner's application for special leave to file second petition for rehearing, with second petition for rehearing attached (Appendix C, infra). Thus, the Court of Appeals had before it the precise federal constitutional questions here presented when, on May 8, 1964, the day on which the Supreme Court of Tennessee refused to issue its writ of certiorari, it entered an order (Appendix C, infra, p. 82, Vol. XI, Supplement to R. 6) denying stay of execution of its judgment, reciting that briefs had been submitted and counsel heard, and *specifically finding* "that no substantial federal question reviewable by the United States Court has been actually and reasonably raised by the petitioner". The

undertaking by the Court of Appeals to determine the existence, vel non, of a substantial federal question in the light of the issues contained in the briefs before the court is of itself sufficient to invoke the jurisdiction of this Court.

REASONS FOR GRANTING THE WRIT.

1. Jurisdiction of this court is called upon to review the decision of the state court under the authority of *American Railway Express Company v. Commonwealth of Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 672, 47 S. Ct. 353, 355; *Demorest v. City Bank Farmers Trust Co.*, 321 U. S. 36, 88 L. Ed. 526, 64 S. Ct. 384; *Broad River Power Co. v. South Carolina*, 281 U. S. 537, 74 L. Ed. 1023, 50 S. Ct. 401. The decision of the state court took the petitioner's property without due process of law in that it is "In clear conflict with the fundamental principles established by our system of jurisprudence for the protection of private rights." *American Railway Express Company v. Kentucky*, supra.

In this case, the petitioner was held liable for the acts of a total stranger where there did not exist even a scintilla of evidence of petitioner's control, right or control or direction, over that stranger, who was also a co-defendant.

Your petitioner operates a flour mill in Chattanooga, Tennessee. The defendant Johnson, an employee of the co-defendant Dixie Feed and Seed Company, was a truck driver who was delivering grain to the petitioner for his employer (R. 1041). Johnson had no relation to the petitioner and was, at most, a business invitee only.

Several months before the occurrence in question, your petitioner's dock foreman informed Johnson of the general area in which he should park his truck while waiting

for a dock to open (R. 582). No directives of any kind were given on the day in question and no employee or representative of the petitioner was present at the time Johnson entered the lot, or at the time of the accident (R. 582).

The petitioner's parking area is enclosed on two sides by a 12 foot concrete block wall. The driver Johnson parked his truck near the wall and then released his clutch while in reverse gear and before the engine had stopped turning, thus causing the thirty ton tractor-trailer to jump back into the wall (R. 1043-1044). Portions of the wall were knocked out onto the sidewalk and street striking and injuring plaintiff who was walking along the public sidewalk adjacent to the wall (R. 364, 457). There is no evidence whatever that any wall, however constructed or braced, would have withstood such an impact. In fact, the uncontradicted testimony offered by the co-defendants disclosed that such a force would have knocked "down any wall you put up there" (R. 1027).

Based on this testimony, the court gave the following charge:

> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence and if you further find that if the co-defendant, Dixie Portland Flour Mills, Inc., was his principal at the time, that is, *that he was acting under their instructions in any manner*, then that would create agency and in that event *you could predicate the liability* of Dixie Portland Flour Mills *upon the negligence* of James Lee Johnson, provided you find that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Incorporated" (Emphasis supplied) (R. 1132).

Under the basic jurisprudence of this nation, a party cannot be held liable for acts of another unless he has

control or the right of control of the method of performance of the act that causes an injury. This standard of control is not met by directives which are supervisory in nature or which are merely necessary cooperation. There is a wealth of authority for this universally recognized rule. As typical examples see, *Smart v. Embry*, 208 Tenn. 686, 348 S. W. 2d 322; *Gulf Refinery Company v. Huffman*, 155 Tenn. 580, 297 S. W. 199; *Rice-Stix Dry Goods Company v. Self*, 20 Tenn. App. 498, 101 S. W. 2d 132; *Sitz v. Bryant*, 184 Tenn. 600, 201 S. W. 985; *Knight v. Hawkins*, 26 Tenn. App. 448, 173 S. W. 2d 163; *Powell v. Virginia Construction Co.*, 88 Tenn. 692, 13 S. W. 391.

This principle has been stated by this Court as being "*Elementary and finds support in a large number of decisions.*" *Denton v. Yazoo* and *Mississippi Valley Railroad Company*, 284 U. S. 305, 308, 76 L. Ed. 310, 311, 52 S. Ct. 141; *Standard Oil Company v. Anderson*, 212 U. S. 215, 53 L. Ed. 480, 29 S. Ct. 252.

So fundamental and well established is this principle of our jurisprudence that we have been unable to find any contrary decision that remains unreversed, except the decision of the Tennessee Court of Appeals in this case.

Every text on the subject has expressed this principle.

> "*The constitutional right to acquire, possess, and protect property prevents making a man liable for the acts and engagements of strangers over whom he has no control.*" 12 Am. Jur. 350, Constitutional Law, Sec. 562. See also, Restatement of Agency, Sec. 250; 56 C. J. S. 51-55, Master and Servant, Sec. 3 (3); 35 Am. Jur. 445, Master and Servant, Sec. 2.

The indication of where to park given to the co-defendant Johnson several months prior to this occurrence was no more than the exercise of the necessary coopera-

tion between any business operation and its business invitees, and evidence thereof does not even suggest a color of control, much less a right of control.

It is inconceivable that such a rule could become law. Even the slightest reflection on the consequences of such a law makes one shudder. For instance, a customer would become the agent and servant of a parking lot operator while parking in an area to which he was directed by the parking lot attendant. Likewise, a university would be the principal of and liable for the negligence of a football game patron while that patron was parking in a particular aisle to which he had been directed by the parking lot attendant.

Despite the obvious unsoundness of such a rule, and in complete disregard for established law, the Tennessee Court of Appeals affirmed the charge that advised the jury that a master-servant relationship existed and that this petitioner was liable if they found that co-defendant Johnson was negligent and that he "was acting under their instructions in any manner". Thus, this verdict directing instruction failed to require the jury to find the basic and essential element of control or right of control by petitioner over the activities of the co-defendant Johnson before they could hold petitioner liable. *This is a radical and capricious departure from our fundamental rule of jurisprudence.*

The reason given by the Court of Appeals for refusing to reverse on this point, despite their findings that at "first blush it seems erroneous to consider Johnson the agent of the Flour Mills" and "that it would have been better to have omitted the charge altogether" (Appendix B, Exhibit B, 32, R. 1259, 1260), was that "it does not affirmatively appear that this portion of the charge affected the result of the trial" (Appendix B, Exhibit B, 32, R. 1260).

How the Court of Appeals could conclude that this verdict directing instruction did not affect the result of the trial is beyond our comprehension. The charge was clearly verdict directing—"in that event, you could predicate the liability of (Petitioner) upon the negligence of James Lee Johnson" (R. 1132). The rule in Terminiello v. Chicago, 337 U. S. 1, 5, 93 L. ed. 1131, 1135, ... S. Ct. ..., applies here: "Since the verdict was a general one and did not specify the ground upon which it rested, it could not be sustained. For one point of the statute was unconstitutional and it could not be determined that the defendant was not convicted under that point."

The law of Tennessee is that an erroneous verdict directing instruction is necessarily prejudicial. "Such errors simply amounted to a misdirection of the jury, and deprived plaintiff of his constitutional right of trial by jury." *Santi v. Duffey*, 40 Tenn. App. 237, 290 S. W. 2d 884.

We respectfully submit that this case does not come within the general rule that this Court is bound by the judgments of state courts in matters of local law whether such judgments be right or wrong. *Patterson v. Colorado*, 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556; *Fox River Paper Company v. Railroad Commission of Wisconsin*, 253 U. S. 25, 64 L. Ed. 759, 40 S. Ct. 422.

On the contrary, since the decision of the Court of Appeals in this case is such a radical and capricious departure from the generally established law of agency as followed by every appellate court in the nation, the case falls within the rule stated in *American Railway Express Co. v. Commonwealth of Kentucky*, 273 U. S. 269, 273, 71 L. Ed. 639, 641, 47 S. Ct. 353:

> "We can not interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or

> is *in clear conflict with those fundamental 'principles which have been established in our system of jurisprudence for the protection and enforcement of private rights.'*" (Quoting from *Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565, 572.) See also, *Demorest v. City Bank Farmers Trust Co.*, 321 U. S. 36, 88 L. Ed. 526, 64 S. Ct. 384, and, *Broad River Power Co. v. South Carolina*, 281 U. S. 537, 74 L. Ed. 1023, 50 S. Ct. 401.

The decision of this Court of Appeals is in "clear conflict with those fundamental principles of jurisprudence." Therefore, petitioner was denied its property by such a judgment without due process of law contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States and under the above authorities this Court's writ of certiorari should issue.

Petitioner's second Question Presented indicates only one method of review is available to a litigant in a Tennessee state court who has suffered abridgement of his federal constitutional rights by a judgment of the state court of appeals, that review is by the discretionary method of an application to the Supreme Court of Tennessee for a writ of certiorari (Appendix A, p. 22). The effect of the action of the Tennessee Supreme Court in denying certiorari is contained in the language of *Powers v. L. & N. R. Co.*, 183 Tenn. 526, 194 S. W. 2d 241, at 242, holding that, "Our action in denying certiorari without memorandum would not indicate our approval of anything but the result reached below." This effect does not expressly or inferentially suggest a review of anything in a petition for certiorari other than the judgment of the court to which the writ is addressed. Thus, no *right of review* is available in the Supreme Court of Tennessee to correct errors of a federal constitutional nature embodied in the judgment of the Court of Appeals.

This Court permits federal questions to be raised for the first time in a state supreme court, where the judgment sought to be reviewed could not, as here, even by the most astute legal prognostications, have been anticipated. *Herndon v. Georgia*, 295 U. S. 441, 74 L. Ed. 530, 55 S. Ct. 794; *Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U. S. 313, 74 L. Ed. 870, 50 S. Ct. 326; *Great Northern R. Co. v. Sunburst Oil Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 S. Ct. 145. Previously decided cases throughout the country and particularly in Tennessee, were in diametrical opposition to the decision of the Court of Appeals in this case.

Due process of law demands that at some point in the course of proceedings properly and timely asserted federal questions will be reviewed. This Court has long held that states may establish whatever procedures they deem necessary and in whatever form, however, in so doing they may not close the door to review of properly raised federal questions. To do so leaves but one tribunal available for petitioner to obtain his initial review of his asserted federal questions and that tribunal is the Supreme Court of the United States.

If this Court does not take jurisdiction, then the rights guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States are meaningless in any state where the only method of reviewing the judgment of an intermediate court is discretionary with the highest court in that state.

That a litigant is entitled to a trial in accordance with the settled course of judicial procedure in the state of venue was clearly established by this Court in *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678.

Petitioner is guaranteed a trial by jury under the Constitution of Tennessee, Appendix A, p. 21. Under that

same Constitution, he is guaranteed that he will not be deprived of his property but by a judgment of his peers or the law of the land, Appendix A, p. 21. He is further guaranteed under Section 17 of Article 1 of the Constitution of Tennessee, Appendix A, p. 22, that the courts shall always remain open to him for redress of wrongs done him.

Stare decisis with respect to a verdict directing instruction coupled with a misdirection of the jury as to the law of the state announces that these errors combined denies the constitutional rights of a litigant to trial by jury. *Santi v. Duffey*, supra, p. 14. See also, *Martin v. Caster-Knott Dry Goods Co.*, 27 Tenn. App. 421, 181 S. W. 2d 638, 642. The instruction complained of (R. 1127) is:

> "* * * The court instructs you that *if you believe the theory and insistence of the plaintiff as to the way and manner in which this accident occurred to be true* from all of the proof as to all defendants, that is by a preponderance of the evidence according to the definition of that term which I have already given you, *then the defendants would be guilty of negligence and your verdict would be in favor of the plaintiff against all defendants.*"

This instruction effectively eliminated from the jury's consideration all other issues submitted under the charge. As indicated in the STATEMENT, there was nothing bizarre in the "way and manner" in which this accident occurred and in no event could the "way and manner" in which the accident occurred have established the predicate for a presumption of negligence against the petitioner. Under the controlling law of Tennessee, negligence is *never* presumed from the mere happening of an accident. *City of Knoxville, Tennessee, v. Bailey*, 222 F. 2d 520, at 529; *Williams v. Jordon*, 208 Tenn. 456, 346 S. W. 2d 583.

Since the way and manner in which the accident occurred, as agreed by all parties, was essentially that the co-defendant driver hit and demolished a portion of petitioner's wall with his loaded tractor-trailer, the jury was forced to accept plaintiff's theory and insistence as true and further find against the defendants under the court's binding instruction.

This verdict directing instruction foreclosed jury consideration of any other issue contained in the charge. That this denied petitioner a trial by jury is patent. *A fortiori*, the trial was not according to the settled course of judicial proceedings in Tennessee.

The essence of the petitioner's injury is that by failure to obtain a trial in accordance with the settled course of state judicial proceedings his property was taken without due process of law, and thereby, his federal constitutional rights under the Fourteenth Amendment were violated. By virtue of the similarity of the provisions of Section 6 of Article 1 of the Constitution of Tennessee, Appendix A, p. 21, and the provisions of the Seventh Amendment to the Constitution of the United States, petitioner alleged violation of his rights under the Seventh Amendment, however, the constitutional questions raised in the petition for certiorari were stated in terms of a Fourteenth Amendment violation although reference was made to the Seventh Amendment, Appendix C, p. 58. Petitioner relies on the doctrine announced in *Braniff Airways v. Nebraska State Board*, 347 U. S. 590, 98 L. ed. 967, 74 S. Ct. 757, to permit petitioner to argue the federal question (assigned as a Seventh Amendment violation) under the Fourteenth Amendment by reason of the fact that the Fourteenth Amendment was specifically raised and argued with respect to all federal questions so presented as to raise a due process violation con-

comitantly with any other stated abridgement under the state or federal constitutions.

Petitioner further relies on the controlling decisions of this Court with respect to the fact that if the highest court of the state undertakes to review and decide the federal questions presented, the jurisdiction of this Court to review is clear. *Charleston Federal Savings and Loan Ass'n. v. Alderson*, 324 U. S. 182, 89 L. ed. 857, 65 S. Ct. 624. Although the determination of the lack of a substantial federal question in this case (Appendix C, p. 84, Supplement to Record Vol. XI, p. 6), was determined by the Court of Appeals attendant to an application for stay of execution of the judgment of that court, in the opinion of the petitioner, this is sufficient to permit this Court taking jurisdiction.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

GEORGE P. BOWIE,
Attorney for Petitioner.

Of Counsel:
JOHN S. CARRIGER,
JOHN D. SCHNEIDER.

APPENDIX A—CONSTITUTIONS AND STATUTES.

Constitution of the United States, Amendment XIV, Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, with due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Tennessee, Article 1, Section 6.

Sec. 6. Trial by jury—Qualifications of jurors.—That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

(Tennessee Code Annotated, Vol. 1 at 216.)

Constitution of Tennessee, Article 1, Section 8.

Sec. 8. No man to be disturbed but by law.—That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land.

(Tennessee Code Annotated, Vol. 1 at 226.)

Constitution of Tennessee,
Article 1, Section 17.

Sec. 17. Open courts—Redress of injuries—Suits against the State.—That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay. Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct.

(Tennessee Code Annotated, Vol. 1 at 312.)

Tennessee Code Annotated, Section 27-819.

Review of Court of Appeals by Supreme Court.

The supreme court, or any judge thereof, shall have the right to require, by certiorari, the removal to that court for review of any case that has been finally determined in the court of appeals, upon a sworn petition for this purpose filed in the supreme court, which petition shall state the substance of the case to be decided, and shall be accompanied by assignments of error and brief in conformity with such rules as the Supreme Court may prescribe; and there shall be no other method of review. (Acts 1925, Ch. 100.)

(Tennessee Code Annotated, Vol. 5, at 874.)

APPENDIX B—OPINIONS AND JUDGMENT BELOW.

Exhibit A—Memorandum Opinion.

Memorandum Opinion. Entered July 30, 1962.

Stanifer G. Byrd

vs.

Dixie Feed & Seed Co., Inc., et al.

In the Circuit Court of Hamilton County, Tennessee. No. 121,756.

This case is before the Court on motions for new trials filed by Mr. Byrd as against the defendant, J. R. Whitehead, d/b/a Comer Gin Company, and by the defendants, Dixie Feed & Seed Co., Inc., James Lee Johnson, and Dixie Portland Flour Mills, Inc., as against plaintiff, Stanifer G. Byrd.

I.

Considering first the motion filed by the plaintiff, Mr. Byrd, the jury returned verdicts for the plaintiff as against three of the defendants but decided against him in his claim versus J. R. Whitehead, etc. To have obtained a verdict against Mr. Whitehead, it was necessary for Mr. Byrd to convince the jury from the evidence that at the time of the accident, the defendant, James Lee Johnson, was an employee or agent of Mr. Whitehead and acting within the scope of his employment. This was fully covered in the Court's charge (Tr. p. 946) and the jury, as the triers of the facts, decided that the driver was not acting as the agent of Mr. Whitehead and returned a verdict, in favor of this defendant, to which the court agrees. Therefore, the motion of Mr. Byrd is overruled.

II.

The other three motions filed by the defendants are divided into two separate pleadings; one is in behalf of the Dixie Portland Flour Mills, Inc. As all three depend on similar alleged errors, the court will discuss them together whenever possible. For practicality, this memorandum will be divided into categories as follows:

A. Charge of the Court.

The trial of this case began on May 1, 1962, and ended when the jury reported its verdict on May 16, 1962.

This Court made every effort to see that the rights of all parties were protected and devoted considerable work in compiling a fair and equal charge to the jury (Tr. pp. 925-953).

Instructions are supposed to enlighten the jury on the applicable law. From this I consider the province and the duty of the trial judge to impart to the jury an understanding of the theories of the parties upon which their contentions are presented and to instruct the jury distinctly and precisely upon the law of the case. This is what I earnestly endeavored to do in this case.

In both motions complaint is made of the Court's use of words "loss of earning capacity." Due to the extreme injuries alleged and proved, the court feels it was proper to use this language.

In the motion of the Georgia defendants, reference is made to the use of the word "intelligence" in Ground XI. In answer thereto, the charge must be looked to "in toto". Tr. p. 940 recites this portion of the charge which I do not consider as error.

The court believes that, taking the instructions as a whole, they do not contain any prejudicial error for or against any of the parties.

The Court does, however, wish to call attention to one item contained in the amended motions of the Dixie Flour Mills. I refer first to Ground IV which contains this language "renewed after defendant stood on its motion for directed verdict." This statement is incorrect as this defendant did not renew its motion for a directed verdict during the course of the trial.

On July 16, 1962, an agreed order was entered allowing this defendant to amend its original motion by adding Grounds VII to XXXI inclusive.

Then on July 20, 1962, a second order was signed by the court which included the following language "and that said amendment now be filed of record in this cause."

The court can see no reason why this minor amendment should be "of record" whereas all other grounds in the motions heretofore filed have been entered in the usual way. It is, therefore, the order of the court that the above quoted language be stricken and included in the order made pursuant to this memo.

It is further contended by Dixie Portland Flour Mills that the court erred and charged the jury on certain questions that were included in plaintiff's declaration but were not sustained in the evidence presented. Particular reference was to the portion of the charge which included the instructions as to whether or not James Lee Johnson was acting as the agent of the Dixie Portland Flour Mills, Inc., at the time of the accident.

This was a part of the charge as this issued was included in plaintiff's declaration and it was the theory of the plaintiff and supported by proof that the defendant Johnson was following the instructions of supervisory employees of the Flour Mills in parking the tractor-trailer unit. This control was denied by the defendant company

which presented a material conflict in the evidence in reaching its verdict. And more important, the liability of the Flour Mills did not depend on this issue, but the controlling issue as to the Flour Mills' liability was its maintaining a dangerous wall surrounding a tractor-trailer parking lot without wheel guards on its premises, which the defendant company could have reasonably foreseen would eventually be struck by parking vehicles and fall to the injury of the public.

All parties emphasized this issue, and the court doubts if the jury gave any serious consideration to the agency question. Since it was a part of plaintiff's pleading, theory and proof, the court feels that it was properly included the charge.

B. Pleas in Abatement.

Complaint is made that the court erred in overruling the Pleas in Abatement filed by the Georgia defendants. The court heard testimony as to these Pleas and found that the Dixie Feed & Seed Co., Inc., a Georgia corporation, was duly in Court by service of process through the Secretary of State as provided by T. C. A. 20-224, and 48-923; and James Lee Johnson was served as provided in T. C. A. 20-224. The court can find no error in this ruling.

C. Selection of Jury.

In ground XXVI in the motion of Dixie Feed & Seed and James Lee Johnson, and ground XXXI in the motion of Dixie Portland Flour Mills, Inc., complaint is made that the court irregularly selected the members of the jury. As no objection or complaint was made until the filing of this motion, the court feels that the defendants waived an irregularity that it believed was taking place.

As these grounds raise the question as to the court's action, there is introduced the Panel list of 84 members

of the jury. Of these, there were 48 present at the opening of the trial. Jurors present were Nos. 4, 5, 6 and 7. The court instructed juror No. 7 to take places in the jury box. It so happened that this jury was composed entirely of men. It also so happened that men were called from the remaining jurors when challenges were exercised. Thus, a jury of 12 men was selected. The court then granted the selection of a 13th juror by reason of the anticipated factors involved in the trial. The court started to select a woman juror as a 13th juror and then the thought occurred to the Court that, considering the anticipated length of the trial, the type injury alleged by the plaintiff, male and female rest rooms adjoining in a 12′ x 18′ jury room, and the possibilities of embarrassment to one lady serving with 12 men, the selection of an additional male member would be preferable. Under these circumstances (see Tr. p. 68) I believe such a decision was discretionary and can see no error in this action.

D. Number of Challenges.

At the beginning of the trial the question arose as to the division of challenges among the four defendants. (Tr. p. 4 and 5.) I followed the 1955 Public Act which entitled the four defendants to a total of six challenges. The Act provides that the Trial Court shall, in its discretion, divide the aggregate number of challenges. I, therefore, allowed four challenges to the three Georgia defendants and two to the one local defendant. None of the parties exercised all of the challenges granted them. In my opinion the jury's verdict shows that the three Georgia defendants did not have identical defenses. I can see no error in my holding.

E. Excessiveness of Verdict.

Complaint is made as to the amount of the verdict as being excessive, and so excessive as to indicate passion,

prejudice or unaccountable caprice on the jury's part. Defendant's counsel for the Georgia defendants made the request that, if the court does not grant a new trial, a substantial remittitur be suggested.

In reviewing all of the evidence, especially that of a medical nature, the court cannot agree that the jury's verdict was excessive. Reference is made to the testimony of the various doctors who have attended the plaintiff and who testified as to the severity of his injuries.

There is no yardstick to measure the proper amount of a verdict. Each case must be examined on its own facts, considering, among other things, the permanency and character of the injury, pain and suffering attendant thereto, medical costs, and all of the other elements of damages. This court observed and heard the plaintiff and the other witnesses concerning the magnitude of the injury and its consequences, and concurs with the jury as to the amount of the verdict.

F. Violation of City Building Code.

There was introduced in evidence an ordinance of the City of Chattanooga which adopted, by reference a Building Code for said City.

The jury heard the evidence introduced in regard to said Code and the manner in which specified sections were said to have been violated.

In the court's charge (Tr. pp. 928-930) the plaintiff's contention in regard to this Code was told to the jury. Also, in the special pleas of the Georgia defendants as contained in the charge (Tr. p. 933), the alleged violation of the Code was cited. All of these allegations were specifically denied by the Dixie Portland Flour Mills, Inc., in its special pleas (Tr. p. 938).

The court finds no error in regard to the evidence or charge concerning the City Building Code.

G. Standing on Motion for a Directed Verdict.

After the defendant Dixie Flour Mills' motion for a directed verdict was overruled, its counsel elected to stand on its motion. This created a novel situation for this court.

After a great deal of discussion, it was held that the Georgia defendants could introduce proof against their co-defendant, Flour Mills, as well as proof in their own defense.

This was done, and all tendered testimony was considered. After all parties had rested their cases, counsel for the Georgia defendants renewed their motions made at the conclusion of plaintiff's testimony, but counsel for the defendant, Dixie Flour Mills, did not renew its former motion but did join in the arguments made to the jury.

In amended motions for a new trial, attempts were made to renew the original motions which the court rules are untimely made, and are overruled.

H. Proximate Cause Proximate Intervening Cause.

This is one of the most important legal questions raised by counsel for all the parties and, for this case, proximate cause and proximate intervening cause will be discussed under the same heading.

The court is in complete agreement that the plaintiff must make out a prima facie case when tested by a motion for a directed verdict.

In this case, the plaintiff had established by sufficient evidence that the defendant Flour Mills as lessee, re-

moved a roof which rested upon the wall involved in this accident. There can be no doubt from all the evidence that this action left a standing wall without any exterior support, located adjacent to the public sidewalk, used by the defendant Flour Mills as an enclosure of a truck parking lot and without any wheel guards or protective measures being taken on the interior of the lot. The Court believes the defendant Flour Mills was negligent both in changing the use of this structure and in the maintenance of the wall without safeguards in its then status. It was open to the view of this defendant who daily used the enclosure for the parking or tractor-trailers and other vehicles in the immediate proximity of the wall. It was only a question of time, under the circumstances existing, until some force would accidentally or otherwise contact this unsupported wall which would topple it over on whoever happened to be nearby. The court is satisfied that the defendant Flour Mills was guilty of actionable negligence in the above regards.

There can be no dispute that defendant James Lee Johnson was guilty of actionable negligence in the way and manner he parked the tractor-trailer.

However, this negligence on the part of defendant Johnson cannot be used to exonerate the defendant Flour Mills as an independent intervening cause, as his action was foreseeable from the time the defendant permitted parking near the wall.

The Court has attempted to review all cases in point and feels that the recent case of Friendship Telephone Co. v. Russom, 309 S. W. 2nd 416, is the most related to our instant case than any presented to the court. It satisfies the court completely as to the foreseeability issue and the liability of the defendant, Flour Mills.

The Court can see no error in any of the other grounds alleged, by either of the three defendants.

The Court is of the opinion that the jury reached correct conclusions as to the liability of each of the defendants as found by the jury.

III.

This memo will be filed by the Clerk and made a part of the record in this case. Copies are to be sent to counsel listed below and plaintiff's attorney is to draw an order to conform to this memo.

Order to Amend — Entered August 1, 1962

Stanifer G. Byrd

vs.

Dixie Feed & Seed Co., Inc., et al.

In the Circuit Court of Hamilton County, Tennessee. No. 121,756.

In this cause, it is ordered by the court that the Memorandum Opinion heretofore filed by the court be amended to strike therefrom the seventh paragraph on page Two (2) thereof.

This amendment to the Memorandum Opinion will be filed by the Clerk and made a part of the record in this cause.

Exhibit B—Opinion of the Court of Appeals of Tennessee.

In the
Court of Appeals of Tennessee.
Eastern Section.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc., Plaintiffs in Error, Versus Stanifer G. Byrd, Defendant in Error.	From the Circuit Court of Hamilton County. Honorable John T. Mahoney, Judge.

Folts, Bishop, Thomas, Leitner & Mann of Chattanooga for Dixie Seed & Feed Company and James Lee Johnson.

Strang, Fletcher, Carriger & Walker of Chattanooga for Dixie Portland Flour Mills, Inc.

H. Keith Harber of Chattanooga for Stanifer G. Byrd.

Opinion.

(Filed Jul. 22, 1963, W. H. Eagle, Clerk.)

McAmis, (P. J.)

Stanifer G. Byrd sued Dixie Feed & Seed Company, Inc., and James Lee Johnson, driver of its truck, and Dixie Portland Flour Mills, Inc., for personal injuries sustained when the truck backed into a cinder block wall on the premises of the Flour Mills causing it to topple and fall on plaintiff as he walked along an abutting sidewalk in Chattanooga. There was a verdict and judgment against all of the above named defendants for $380,000.00 from which they prosecute the present appeal.

Dixie Feed & Seed Company, Inc., is a non-resident corporation with situs at Comer, Georgia, where its driver, James Lee Johnson resides. At the time plaintiff was injured, Dixie Portland Flour Mills, Incorporated, occupied, under a lease contract, premises on King Street in Chattanooga where it received, stored and processed grain. A parking area fronting on King Street was enclosed with a cinder block wall approximately 11 feet high. Truck drivers delivering grain were directed to enter this area and park awaiting an opportunity to unload. On one or more previous trips, defendant Johnson had been told by agents of the Flour Mills to park his truck in this area.

On the day of the accident, Johnson drove the truck of the Feed & Seed Company loaded with grain into this parking area to await his turn to unload. He backed the truck within about 1 foot of the wall and cut the switch. Thinking the motor had stopped, he took his foot off the clutch. Thereupon the truck being in reverse gear lurched backward, struck the wall and toppled it upon plaintiff inflicting grievous injuries, the nature and extent of which will be hereinafter detailed. Johnson was aware that the truck had acted in this way on one previous occasion.

Johnson and the Feed and Seed Company were brought before the court by service of process on the Secretary of State pursuant to the provision of T. C. A. 20-224 giving the courts of Tennessee jurisdiction over nonresident owners and operators of vehicles registered in a foreign state. Both filed pleas in abatement on the ground, among others, that since the truck was upon private property and was not being operated on a public highway the statute authorizing service of process upon the Secretary of State has no application.

We think, under the unique circumstances of this case, the statute applies. The offending vehicle upon coming into the State made use of the public highways of Tennessee for the purpose of delivering grain at the point where the injury occurred in consummation of the owner's contract. Delivery by motor truck at that point could not have been effected without the use of the public highways of Tennessee. And, while there is no proof that the rear of the truck crossed the property line, it was within less than a foot of the street line when it struck the wall and the force of the impact caused the wall to fall on the sidewalk of King Street, a public thoroughfare. Under these circumstances it would be doctrinaire in the extreme to say that a person so injured is to be denied the benefit of the statute solely on the ground that the vehicle was not being operated upon a public thoroughfare.

The question it seems to us was put to rest in Bertrand v. Wilds, 198 Tenn. 543. In that case the injury occurred on a road within the grounds of a veterans hospital and, therefore, not upon a public highway or road. The plea in abatement in that case asserted a lack of jurisdiction, to which the author of the opinion, Mr. Chief Justice Neil, after noting that the vehicle had used the public highways to reach the hospital grounds, responded:

"It is our well-considered opinion that the statute applies to the operation of motor vehicle upon public highways by nonresidents and also to the operation of such vehicles on private property, as a necessary incident to public travel upon the streets and highways of this State. Paduchik v. Mikoff, 158 Ohio St. 533, 110 N. E. (2d) 562, construing the statute of Ohio, which is similar to ours, and Sipe v. Moyers, 353 Pa. 75, 44 A. (2d) 263, construing the Pennsylvania statute, which is also similar in all respects to our own statute.

"In Paduchik v. Mikoff, supra, the defendant's contention was identical with the defendant, petitioner in the instant case, that is, that the 'substitution of service statute' was not applicable unless the accident happened on a public highway. The sole issue involved the jurisdiction of the local courts of Ohio over the person of a nonresident who was enjoying the privilege of using the state's highways. In ruling upon this issue, it was held (158 Ohio St. 533, 110 N. E. (2d) 567):

" 'Unquestionably, such jurisdiction extends to the operation of motor vehicles on the public highways of the state and, in the opinion of this court, it also extends to the operation of the motor vehicle operated on private property in private garages and on private parking lots **as an incident to its operation on such highways.**' (Emphasis supplied.)

"It is true there are cases to the contrary, such as where the accident happened while operating a 'combine harvester' in a wheat field in such a manner as to set fire to and destroy twenty-one (21), acres of wheat. Kelley v. Koetting, 164 Kan. 542, 190 P. (2d) 361, and other cases cited by the Ohio Court.

"The living force of our statute, however, and similar statutes in other states, clearly serves the public interest. These statutes, reasonably adopted to remedy the evil of an ever increasing number of accidents arising from the operation of motor vehicles both on our highways and elsewhere, represent a constitutional exercise of the police power."

In Ellis v. Georgia Marble Co., 191 Tenn. 229, the statute was invoked to bring in the nonresident owner of a truck from which the plaintiff when injured was unloading marble. The declaration charged negligent packing of the marble before it left Georgia. In an opinion by Mr. Justice

Burnett, the statute was held inapplicable not because the truck was standing on private property but, as we read the opinion, because the vehicle was never "involved" in an accident. That case is not in point under the facts of this case.

The first assignment of the Feed & Seed Company and Johnson complaining of the overruling of their plea in abatement is overruled. It is unnecessary to consider whether the Feed & Seed Company was amenable as a foreign corporation doing business in Tennessee to process on the Secretary of State under T. C. A. 48-923.

The Feed & Seed Company insists the Court erred in refusing to charge its special request to the effect that any recovery allowed plaintiff would not be subject to the payment of Federal Income taxes. In the excellent brief of counsel it is very properly conceded that this action of the Court is in accord with the weight of authority. It is said, however, that the minority view is supported by the better reasoned cases and should be followed in this state. We can not agree.

In connection with a comprehensive annotation on this subject it is said editorially at 63 A. L. R. 2d 1398:

"From the personal injury cases dealing with the present topic, it can be said that the more general view, supported directly and inferentially by the decided majority of the American cases, is that in fixing damages for accrued loss of earnings or for impairment of future earning capacity because of personal injuries, the income tax consequences of the injury and the award should not be taken into consideration; on the contrary, the award of damages should be based upon the plaintiff's gross earnings or earning capacity and should not be reduced because of any income tax saving which may result to the plaintiff from the fact that the damages will be exempt from income tax."

As appears from an analysis of the cases appearing in the above annotation, the reasons advanced in support of the majority view are that to deduct the anticipated tax saving from the recovery would nullify the tax benefit conferred by Congress in expressly exempting damages for personal injuries and would unduly complicate the trial of personal injury cases. In addition, we think, to attempt to do so would inject into the already difficult and complicated computation of such damages factors which change from time to time, such as the rate of taxation and the number of plaintiff's exemptions, and allow juries to indulge in speculation and conjecture in arriving at the amount to be deducted.

It is next insisted the Court erred in excluding evidence offered to show plaintiff's optional and compulsory retirement ages as a postal employee, his retirement benefits and the payment to him after he was injured of accumulated sick leave benefits.

In resolving this question it is important to keep in mind that in an action to recover for personal injuries it is not the loss of time or earnings that the wrongdoer must pay for but loss of the ability to earn that constitutes an element of damages. This was made clear by Judge Felts, now Mr. Justice Felts, in Southern Coach Lines, Inc. v. Wilson, 31 Tenn. App. 240 where it was said:

"It is true this distinction is often not observed. Indeed, it is of no practical importance in some cases. For instance, in a case where the plaintiff was earning, and, if he had not been injured, would have continued to earn at the same rate during the period of his incapacity, his loss in earnings furnishes practically an accurate measure of his loss in earning capacity. But in other cases the distinction is vital and failure to observe it would lead to an unjust result.

"This is true in a number of cases where recovery is allowed for loss of earning capacity though there has been no loss of earnings; as where plaintiff's employer gratuitously paid his wages during his incapacity (Railroad Co. v. Porter, 117 Tenn. 13, 94 S. W. 666); where he is receiving greater wages than before his injury (Central Mfg. Co. v. Cotton, 108 Tenn. 63, 66, 65 S. W. 403; Adamant Stone & Roofing Co. v. Vaughn, 7 Tenn. App. 170, 181; Ostertag v. Bethlehem Shipbuilding Corp., 65 Cal. App. (2d) 795, 151 P. (2d) 647); or where he was not working and would not have worked during the period of his incapacity. Doherty v. Ruiz, supra; McIver v. Gloria, 140 Tex. 566, 169 S. W. (2d) 710; Mississippi Cent. R. Co. v. Smith, 176 Miss. 306, 168 So. 604; Restatement, Torts, secs. 906 (Comment c) and 924 (Comment c)."

In Railroad v. Porter, 117 Tenn. 13, cited by Judge Felts, the Court dealt at some length with the propriety of considering in diminution of damages compensation gratuitiously paid by the plaintiff's employer after he was injured and cited a number of cases from other jurisdictions dealing with this question as well as the question of benefits accruing under insurance contracts. As we read the opinion it holds unequivocally that these are extraneous matters and are not to be considered.

The modern tendency is to regard pension benefits as deferred compensation for services rendered. So considered, they represent accumulated savings as much as money in the bank or investments in income producing property. With the exception of cases arising under the Federal Tort Claims Act the courts unanimously hold that damages in personal injury cases are not subject to mitigation because the plaintiff is receiving or will receive a pension. Anno. 75 A. L. R. 2d 886.

The assignment of the Feed & Seed Company and Johnson as well as that of the Flour Mills complaining of the exclusion of this evidence are overruled. Discussion of the assignments of all defendants complaining of the amount of the verdict will be jointly considered after disposing of the other assignments of the Four Mills.

Its first assignment is that the Court erred in not sustaining its motion for a directed verdict at the close of plaintiff's proof in chief. Interwoven with this insistence is the question of the effect of this defendant standing on its motion and announcing that it had rested, would disclaim the benefit of any evidence thereafter introduced by its co-defendants and would not be bound by any further evidence introduced in the case.

In disposing of this assignment we need not consider the effect of this announcement, for we have concluded that plaintiff's evidence in chief was sufficient to take the case to the jury and constitutes material evidence sustaining the verdict. On that question, a statement of the averments of the common law count of the declaration and a brief summary of plaintiff's proof in chief will suffice.

The common law count charges that after defendant Flour Mills entered into possession of the premises under lease contract it removed an existing roof over the parking area in question which had theretofore served to brace and strengthen the wall without providing other braking action in lieu thereof, failed to warn drivers of incoming truck loads of grain that the cinder-block wall was unsupported and unprotected by wheel guards adjacent to the wall to check any trucks in the area and prevent them from coming in contact with the wall with resulting danger to pedestrians on the sidewalk and that no warning was given pedestrians of the danger of trucks being parked within the parking area next to the wall.

Clifford A. Betts, Jr., a structural engineer, testified that he had examined the wall; that it was too high for its width, was unstable and insufficient to withstand wind pressures. As to its adequacy as an enclosure for a parking lot and what would have been necessary to make it suitable for that purpose he testified:

"Number one, it would be absolutely necessary to put in some sort of wheel barrier a distance of . . . in the neighborhood of five or six feet, say, and high enough to prevent a vehicle from coming in contact with the structure. Number two, the wall would have to be braced up with either buttresses or piers, as I mentioned before, no less than two, in my opinion, would be necessary, centered or spaced out evenly along the wall's length."

Mr. Betts further testified that the roof previously supported by the wall served to stabilize it by preventing it from moving sideways as the result of pressure from the side.

Other proof for plaintiff established that the truck, operated by defendant Johnson in the area where he had previously been directed to park by agents of the Flour Mills, while so parking struck the wall and caused it to fall upon the sidewalk where it struck and injured plaintiff.

It is clear that, under the proof, the questions of common law negligence and proximate cause were for the jury. The Court was not asked to rule separately on each count of the declaration. The motion was general and in the absence of such request there was no error in failing to direct a verdict on those counts of the declaration charging a violation of the municipal building code. As said in Tayor et al. v. Cobble, et al., 28 Tenn. App. 177, it is impractical to expect the trial judge on general motion for a directed verdict to apply the proof to the several counts of the declaration without any expression or assistance from counsel for the moving party.

Under assignment Three it is insisted the court erred in refusing to charge as requested that, the Flour Mills having rested its case and made the announcement above mentioned, the jury should not consider as against it evidence introduced by its co-defendants.

The granting of the motion for a directed verdict at the close of plaintiff's proof in chief was a matter within the discretion of the trial judge. Since he exercised that discretion by overruling the motion, evidence could thereafter be introduced touching the liability of the Feed & Seed Company. It follows that there was no error in declining to charge the special request. Sadler v. Draper, 46 Tenn. App. 1, 326 S. W. 2d 148.

If we are mistaken in this holding, however, we do not think the Feed & Seed Company was prejudiced in view of the undisputed evidence of the condition of the wall above detailed.

The second half of this assignment complains of the refusal of the Court to charge as requested:

"Gentlemen of the Jury, I further charge you that where two distinct causes, unrelated in operation, contribute to an injury and one of them is the direct proximate cause and the other merely furnished the condition or gave rise to the occasion by which the injury was made possible the former will alone be regarded as responsible for the result."

The refusal to so charge was not error. The Feed & Seed Company did more than merely create the condition by which the injury was made possible. Knowing the unstable condition of the wall it invited truck drivers to park their trucks in such close proximity thereto that any slight miscalculation of drivers could cause an injury to persons on the sidewalk.

The fourth assignment is that the Court erred in charging:

"Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland Flour Mills, Incorporated, was his principal at the time, that is, that he was acting under their instructions in any manner, then that would create an agency, and in that event you could predicate the liability of Dixie Portland Flour Mills, Incorporated, upon the negligence of James Lee Johnson, provided you find that Johnson was, at the time of this accident, the agent of Dixie Portland Flour Mills, Incorporated."

While the Court did not in terms relate this charge to the act of the Flour Mills in directing drivers where to park, the jury may have so assumed.

At first blush, it seems erroneous to consider Johnson the agent of the Flour Mills. However, the record shows that one reason for lining up the trucks near the wall as they entered the premises was to prevent congestion which might interfere with the movement of trucks out of the plant carrying the finished product of the Flour Mills. To that extent it had an interest in the parking of trucks near the wall and to that limited extent we think if Johnson acted under the instructions of the Flour Mills he might be considered its agent. There is no suggestion that Johnson ever acted in any other way as the agent of the Flour Mills and, unless the charge complained of is to be taken as relating to the parking of the truck at the particular place in question, it is a mere abstraction in the charge.

The appellate court will not reverse on the ground the court charged the jury on an abstract proposition not raised or having no application to the proven facts unless

it affirmatively appears that the charge affected the result of the trial. Hughes v. Taylor, 29 Tenn. App. 548, 198 S. W. 2d 337, and cases cited.

While we think it would have been better either to have omitted this charge altogether or related it directly to the purpose of the Feed & Seed Company to keep the parking area clear for its outgoing trucks, it does not affirmatively appear that this portion of the charge affected the result of the trial. On the contrary, in view of the undisputed evidence that due to the removal of the roof and the absence of a guard curb the wall was a hazard to pedestrians on the sidewalk, we think it most unlikely that the jury gave any consideration to whether Johnson acted as agent of the Flour Mills in parking the truck and cutting the switch in such close proximity to the wall, as charged. The charge is not necessarily to be taken as leaving that question to the jury and, therefore, is to be considered ambiguous rather than affirmatively erroneous.

Other assignments relating to the charge have been considered and found without merit because not shown to be prejudicial in view of the undisputed evidence of common law negligence or because not included in the motion for a new trial. To discuss each at length would extend this opinion beyond reasonable limits.

Remaining to be considered is the question of the excessiveness of the verdict.

The injuries sustained by plaintiff were unusual and devastating. Although his mind was not affected, that he is totally and permanently disabled appears without serious question. At the time of the accident he was regularly employed as the operator of a mail delivery truck, earning with overtime pay, approximately $6,000.00 per year. At the time of the accident he was 59 years of age and had a life expectancy of 16.4 years. At the

time of the trial he had suffered a loss of earnings amounting to $10,848.06. If he had worked on until compelled to retire at age 70, his earnings subsequent to the date of trial would amount to approximately $51,000.00. His total medical expenses to the date of the trial amounted to $35,343.14. His physician, Dr. Arnold, estimated that his future bills for drugs, dressings and disposal bags will amount to $50.00 per month or, for the period of expectancy following the trial, a total of $8,760.00 and that his doctor should check him about once each week. The cost of such future calls at $5.00 would amount to approximately $3500.00.

Computed up to the date of compulsory retirement his loss of income, past and future, totals $61,848.00; medical expenses already incurred $35,343.14; future medical supplies $8,760.00, making a total of $105,951.14, exclusive of future doctor's bills, hospital bills and nursing. These prospective expenses require some further development of the extent and nature of plaintiff's injuries.

The medical proof shows that, due to a spinal injury, plaintiff is permanently paralyzed from the navel down. Due to this injury and complications arising therefrom he has had, including plastic operations resulting from a severe and deep seated bed sore, eleven major surgical operations. To prevent infection due to a complete inability to control kidney and bowels action, drainage outside the body had to be provided, necessitating disposal bags outside the body for urine and the opening of the abdomen to bring the large bowel outside where it was stitched to the outer wall and where it will have to remain. This, however, does not solve the lack of bowel control. He has suffered a complete loss of sexual powers.

The medical proof is that with proper medical and nursing care plaintiff should live out his normal expect-

ancy. He will have to remain in bed for the greater part of each day but will be able to sit in a wheel chair an hour or more during the day. He will be able to propel and guide the chair within his home. With adequate assistance he can get in and out of an automobile and possibly operate a specially constructed car himself.

There is little or no dispute that he will need throughout the remainder of his life someone subject to call 24 hours a day. This must be a person strong enough to lift him in and out of bed and into the wheel chair. While the person in attendance need not be a registered nurse or even a licensed practical nurse, such person must have sufficient experience in handling such cases to recognize and meet problems as they arise and willing and capable of attending to his disposal facilities. To prevent bed sores common to persons paralyzed below the waist it will be necessary that he be turned every two hours. Except when hospitalization may occasionally be necessary he will be able to live at home.

There is no proof as to the probable cost of hiring persons capable of performing the necessary nursing duties and strong enough to do the required lifting. The nearest approach is proof that licensed practical nurses charge $12.00 for an eight hour day. On that basis and assuming the need for three shifts during each 24 hours, plaintiff's counsel arrives at the figure $191,736.00 by multiplying $36.00 by 127,824 hours life expectancy.

Our difficulty lies in the fact that according to plaintiff's physician a licensed practical nurse will not necessarily be required and that constant attendance and care will not be necessary but only that someone be subject to call. Another deficiency in the record is the lack of proof that persons possessing the inclination and training to do this work can be obtained and the probable cost of obtaining such services.

If we accept counsel's figure of $191,736.00 and add to that the above figure of $105,951.14 we arrive at a total of $297,687.14 without considering possible future doctor's bills, pain and suffering, inconvenience and the deprivation of the enjoyment of the normal activities of life. We can not know how much value the jury may have placed upon such intangible elements of damage.

If, as seems probable, the jury accepted plaintiff's figure of $36.00 per day for three shifts of licensed practical nurses and multiplied that figure by plaintiff's life expectancy, they found that the total future nursing cost would amount to $191,736.00. This figure added to our figure of $105,951.14 actual expenses and loss of earnings, past and prospective, would amount to $297,687.14. From this it may be inferred that the jury allowed the difference between that figure and the $380,000.00 verdict, or approximately $80,000.00 for pain and suffering, etc.

While we have no disposition to minimize the great tragedy that has befallen plaintiff, the proof shows that due to paralysis the pain has not been commensurate with the other elements of damages.

It is obvious from the foregoing statement of plaintiff's injuries and resulting loss of income and expenses for medical and nursing care, both past and prospective, that a verdict and judgment in excess of any heretofore considered by the appellate courts of Tennessee is warranted. We are, therefore, not justified in suggesting a remittitur because the amount is in excess of any verdict heretofore approved. The rule guiding our deliberation remains the same, i. e., we are to remember that the amount to be awarded in personal injury cases is primarily within the discretion of the jury and trial judge and we are not to substitute our judgment for theirs or interfere unless there has been an abuse of

discretion and the amount of the verdict is so large as to strike the average mind as palpably excessive and unjust. And if a remittitur is suggested the amount suggested should be only "such amount that, if accepted, the verdict, as reduced, would not be palpably excessive, giving to the jury and trial judge the latitude in fixing the amount to which they are entitled in the free exercise of their discretion." Olson v. Sharpe, 26 Tenn. App. 557.

To apply these guiding principles to the case at bar, we feel that a remittitur in some amount is indicated since the proof failed to establish the need for licensed practical nurses 24 hours of each day. The plaintiff's own proof disproves this hypothesis as above noted; and the record fails to show what it would cost to have a person with the required qualification, perhaps living in the home, on call for 24 hours each day. If such a person should be used the value of board and lodging should be added. In the present state of the record we could, at best, only guess at a proper allowance for future nursing expense, as the jury must also have been forced to do under the undisputed evidence above discussed.

Reluctant as we are under the circumstances to attempt to suggest an amount, remembering that plaintiff does not have to accept it, we suggest a remittitur of $90,000.00. If accepted, judgment will be entered here for $290,000.00. Costs are adjudged against defendants and sureties on their appeal bonds.

L. Amis,
Presiding Judge.

Concur:

Cooper, J.,
Judge.

Taylor,
Sp. Judge.

Exhibit C—Opinion of the Court of Appeals of Tennessee, on Petition to Rehear.

Dixie Feed & Seed Co. et al.

versus

Stanifer G. Byrd.

} Hamilton Law.

(Filed September 27, 1963, W. H. Eagle, Clerk.)

Petitions to rehear have been filed by Dixie Feed & Seed Company and its driver Johnson and by Dixie Portland Flour Mills, Inc.

In their petition to rehear Dixie Feed & Seed Company and Johnson first complain because we failed to pass on whether the Feed & Seed Company was subject to process under T. C. A. 48-923. Having held the Feed & Seed Company and Johnson subject to process under T. C. A. 20-224, it was not necessary to hold whether the Feed and Seed Company was also amenable to service as a non resident corporation doing business in Tennessee. This Court is not required or expected to rule upon questions of law deemed to be immaterial or non-determinative of the result. To do so would invite confusion and uncertainty as to whether the holding should be regarded as authoritative or mere dictum.

These petitioners further complain because we failed to pass upon the constitutionality of T. C. A. 48-923 and T. C. A. 20-224. As pointed out it was unnecessary to pass upon the applicability of T. C. A. 48-923. This holding eliminated the necessity of passing upon its constitutionality. As to the constitutionality of T. C. A. 20-224, we cited and quoted at some length from Bertrand v. Wilds, 198 Tenn. 543, where the question of the constitutionality of the statute is discussed and the statute

sustained as a proper exercise of the police power. It was our intention to hold it constitutional. It is so held.

The petition to rehear of the Feed & Seed Company and Johnson are overruled.

The first ground of the petition filed in behalf of Dixie Portland Flour Mills is that we erroneously treated its motion as a general motion for a directed verdict when, in fact, the following was added at the end of the motion: "and a special motion on each count of the declaration."

We need not decide whether this language had the effect of making the motion something more than a general motion for a directed verdict. Even if it did have that effect, failure of the Court to sustain the motion as to the second count of the declaration charging a violation of the ordinances of the City of Chattanooga adopting a building code did not constitute reversible error in view of the evidence of common law negligence tending to sustain the first count of the declaration.

In City Transportation Corp. v. Seekler, 32 Tenn. App. 661, it was said (p. 667):

"If we are mistaken, however, in holding that the court was not in error in overruling the motion for directed verdict as to the charge of the declaration respecting the school zone speed limit, we are clearly of opinion it is the duty of this court to treat any error in respect to that charge as harmless and apply to the judgment the findings of the jury on the common law counts and the charges of violating the 30 mile speed limit in business and residential areas contained in the statutory count."

The opinion cites in support of the holding the opinion of Mr. Chief Justice Green in Tennessee Central Railway Co. v. Umenstetter, 155 Tenn. 235, 291 S. W. 452, 453,

and see Taylor et al. v. Cobble et al., cited in our original opinion.

Under the second ground of the petition to rehear it is insisted we failed to respond to petitioner's assignment of error complaining that the trial court erred in admitting into evidence a building code "in no way relevant to the issues before the court."

As noted in our original opinion the witness Betts, a structural engineer, testified as to the instability of the walls. The Flour Mills offered no evidence to the contrary. Thus there was undisputed evidence from which the jury could find common law negligence. It is immaterial whether, as charged in the declaration, the wall as so constructed was also in violation of the building code which the Flour Mills insists does not apply. It, therefore, does not affirmatively appear that, even if erroneous, the admission of this evidence affected the result of the trial.

Under T. C. A. 27-117, we are forbidden to reverse where there is sufficient competent evidence to sustain the verdict and it does not affirmatively appear that the erroneous admission of evidence affected the result. Louvier v. Nashville, 1 Tenn. App. 401; Butler v. State, 185 Tenn. 686; Management Service, Inc. v. Hellman, 40 Tenn. App. 127, 289 S. W. 2d 711.

It is next insisted we erred in not reversing because of certain remarks made by the trial judge in the presence of the jury. The assignment predicated upon these remarks was overruled because not embraced within the motion for a new trial.

As pointed out in the reply brief the writer inadvertently referred in the former opinion to Dixie Feed & Seed Company where Dixie Portland Flour Mills was obviously intended. These erroneous references are recalled and corrected.

We are also asked to limit the time within which the remittitur may be accepted. The time will be limited to the period of 10 days after the filing of this opinion.

For reasons indicated we adhere to our original conclusion that the judgment should be affirmed, subject to the suggested remittitur.

L. Amis,
Presiding Judge.

Concur:

Cooper, J.,
Judge,

Taylor,
Special Judge.

Exhibit D—Judgment of the Court of Appeals of Tennessee.

Court met pursuant to adjournment present and presiding the Honorable Judges Luke M. McAmis, R. E. Cooper and Special Judge Earnest R. Taylor.

The minutes of yesterday were read and signed when the following proceedings were had to-wit:

In the Court of Appeals of Tennessee.
Eastern Section.

May Term 1963.

Friday, May 17th, 1963.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc., Plaintiffs-in-error vs. Stanifer G. Byrd, Defendant-in-error.	No. 88. Hamilton County Law. Affirmed.

Judgment.

(Filed Aug. 28, 1963, W. H. Eagle, Clerk.)

This cause came on to be heard on the transcript of the record from the Circuit Court of Hamilton County, Tennessee, assignment of errors, briefs and argument of counsel, from all of which the Court is of the opinion and Orders and Adjudges that there is no error in the judgment of the Trial Court for the reasons set forth in the opinion of the Court, filed herein and made a part of the record in this case except for a suggested remittitur, and that the assignment of errors are all overruled and disallowed with the exception of the assignments as to excessiveness of the verdict, which are sustained and which result in a suggested remittitur of Ninety Thousand ($90,000.00) Dollars from the judgment of Three Hundred Eighty Thousand ($380,000.00) Dollars. The judgment of the Trial Court in all things other than amount is affirmed. Stanifer G. Byrd, defendant-in-error through his attorney hereby elects to make the remittitur under protest in accord with Section 27-119, Tennessee Code Annotated. It is therefore:

Ordered and Adjudged by the Court that the judgment of the Court below be and the same is in all things affirmed with a remittitur of Ninety Thousand ($90,000.00) Dollars made under protest of defendant-in-error from the judgment of Three Hundred Eighty Thousand ($380,000.00) Dollars and the defendant-in-error, Stanifer G. Byrd shall have and recover of the plaintiffs-in-error, Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc., the sum of Two Hundred Ninety Thousand ($290,000.00) Dollars and costs of the cause for all of which execution is awarded.

Consent to entry of this judgment shall not be considered as waiving or abandoning the pending petitions to rehear, and to this extent this shall not be deemed the final judgment herein. The judgment on the pending petitions to rehear shall be the final judgment herein, after which both plaintiffs-in-error and defendant-in-error shall have forty-five (45) days within which to file petitions for writ of certiorari.

Enter this .... day of August, 1963.

.....

Presiding Judge.

O. K.

Folts, Bishop, Thomas, Leitner & Mann,
Attorneys for Dixie Feed & Seed Company, Inc.,
and James Lee Johnson.

By: W. Neil Thomas, Jr.

Strang, Fletcher, Carriger & Walker,
Attorneys for Dixie Portland Flour Mills, Inc.

By: John S. Carriger.

H. Keith Harber,
Attorney for Stanifer G. Byrd.

H. Keith Harber.

Exhibit E.—Denial of Petition to Rehear, Making Judgment (Exhibit D, Above) Final.

In the Court of Appeals of Tennessee at Knoxville.

May Term 1963.

Friday, Sept. 27th, 1963.

Court met pursuant to adjournment, present and presiding the Honorable Judges Luke M. McAmis, Robert E. Cooper and Special Judge S. J. Milligan.

The minutes of yesterday were read and signed when the following proceedings were had to-wit:

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.

vs.

Stanifer G. Byrd.

Hamilton Law. Petitions to Rehear Denied.

This cause came on to be further heard on the Petitions to Rehear and Reply thereto, upon consideration whereof the Court is of opinion the petitions are not well taken and should be denied.

It is therefore ordered and decreed that the petitions to rehear are denied, excepting that a time limit be set to a period of ten days after the filing of the Court's opinion to accept the suggested remitfitur.

Costs on petitions to rehear will be paid one-half by Dixie Feed & Seed Company, Inc., and James Lee Johnson and sureties Folts, Bishop, Thomas, Leitner and Mann and one-half by Dixie Portland Flour Mills, Inc., and sureties Goins, Gammon, Baker and Robinson and Strang, Fletcher, Carriger and Walker, for which let execution issue.

APPENDIX C—RECORD EXTRACT SHOWING HOW FEDERAL QUESTION IS PRESENTED.

1. Motion for New Trial.

III.

The verdict is contrary to the law applicable to the cause.

XII.

The Court erred in charging the jury as follows:

"However, the Court instructs you that if you believe the theory and insistence of the plaintiff as to the way and manner in which this accident occurred to be true from all of the proof as to all of the defendants, that is, by a preponderance of the evidence according to the definition of that term which I have already given you, then the defendants would be guilty of negligence and your verdict would be in favor of the plaintiff against all of the defendants."

XIX.

The Court erred in charging the jury as follows:

Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland Flour Mills, Incorporated, was his principal at the time, that is, that he was acting under their instructions in any manner, then that would create an agency, and in that event you could predicate the liability of the Dixie Portland Flour Mills upon the negligence of James Lee Johnson, provided you find that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Incorporated.

XX.

The Court erred in charging the jury as follows:

If you find from the proof in this case that the defendant Johnson was the agent of or servant of the Dixie Portland Flour Mills, Incorporated, at the time and place of this accident, then his acts would be attributable to that defendant.

2. Assignments of Error, Dixie Portland Flour Mills, Inc.

I.

The Court Erred in Not Directing a Verdict for Defendant Flour Mill.

* * * * * * * *

The verdict is contrary to the law applicable to the case.

* * * * * * * *

IV. (a)

It was error for the Trial Judge to instruct the jury as follows:

> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland Flour Mills, Incorporated, was his principal at the time, that is, that he was acting under their instructions in any manner, then that would create an agency, and in that event you could predicate the liability of the Dixie Portland Flour Mills, upon the negligence of James Lee Johnson, provided you find that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Incorporated." (Tr. 1132).

And it was error for the Trial Judge to instruct the jury:

> "If you find from the proof in this case that the defendant Johnson was the agent of or servant of the Dixie Portland Flour Mills, Incorporated, at the time and place of this accident, then his acts would be attributable to that defendant" (Tr. 1133).

It was error for the Court to give either or both of these parts of the Charge for the reason that there was no evidence that the said Johnson was in any way the agent or servant of Flour Mill; and further, in the first portion mentioned above the Trial Judge did not correctly instruct the jury on applicable law in that he erroneously charged that if Johnson "was acting under their instructions **in any manner**, then that would create an agency." Also, in subsequently giving the latter part of the instruction above quoted, the Trial Judge gave emphasis by repetition to this error. These errors were made the basis of grounds XIX and XX of Flour Mill's motion for a new trial, which motion the trial Court disallowed (Tr. 182, 183).

IV (d).

It was error for the Trial Judge to instruct the jury as follows:

> "However, the Court instructs you that if you believe the theory and insistence of the plaintiff as to the way and manner in which this accident occurred to be true from all of the proof as to all of the defendants, that is, by a preponderance of the evidence according to the definition of that term which I have already given you, then the defendants would be guilty of negligence and your verdict would be in favor of the plaintiff against all of the defendants." —Tr. 1127.

This was made the basis of ground XVI of Flour Mill's motion for a new trial which motion the Trial Court disallowed.—Tr. 182. This prejudicial charge in effect directed a verdict for the plaintiff. Under this instruction the jury had no alternative but to return a verdict in favor of the plaintiff. A conscientious juror hearing this charge could not follow this instruction and at the same time bring in a verdict for defendant Flour Mill. There was no dispute whatever as to the way and manner in which the accident occurred.

3. Petition for Writ of Certiorari.

V.

Also, petitioner respectfully shows that the provisions of the Constitution of Tennessee as set out in Section 8, Article 1, and the 7th Amendment to the United States Constitution appear to have been violated by the trial judge's action (and by the affirmance of the Court of Appeals), when the trial judge instructed the jury in such a misleading manner as to authorize the taking of the property of Flour Mills by verdict and judgment, without giving to Flour Mill the right provided by our Constitutions of a fair determination of the issue of agency. Instead, the Court in effect directed the jury that Johnson was the agent and servant of Flour Mill. If the trial court was to take any action in that regard it should have been to instruct the jury that Johnson was not such an agent under the proof that had been introduced. Instead, the trial court charged the jury in such manner, unsupported by legally sufficient evidence, as to deprive Flour Mills of its constitutional rights.

VIII.

In at least two instances in the charge of the Court to the Jury, the Trial Judge in effect told the jury

to include Flour Mill in any verdict the jury brought in on behalf of the plaintiff. Those parts of the Court's instructions to the jury could not be interpreted otherwise, then or now.

(a) In one place the Trial Judge instructed the jury that if driver Johnson was acting under the instructions of Flour Mill "in any manner," then that would "create an agency," and in that event the jury could predicate liability of the Dixie Portland Flour Mill upon the negligence of James Lee Johnson. That part of the charge was assigned as error "IV (a)" before the Court of Appeals, the body of that Assignment being:

> "It was error for the Trial Judge to instruct the jury as follows:
>
> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland **Flour Mills**, Inc., was his principal at the time, that is, that he **was acting under their instructions in any manner**, then that would create an **agency**, and in that event you could **predicate the liability** of the **Dixie Portland Flour Mills upon** the **negligence of James Lee Johnson**, provided you find that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Inc." (Tr. 1132) (Emphasis supplied).

A little later and at a different place in the Charge, the Trial Judge emphasized this error by further instruction to the jury, which was also included as a part of that same Assignment of Error before the Court of Appeals, the Trial Judge then saying to the jury:

> "If you find from the proof in this case that the defendant Johnson was the agent of or servant of the Dixie Portland Flour Mills, Inc., at the time and

place of this accident, then his acts would be attributable to that defendant" (Tr. 1133).

(b) Another instance of error to instruction which was woefully prejudicial to the petitioner Flour Mill occurred when the Trial Judge mistakenly charged the Jury as follows:

> "However, the Court instructs you that if you believe the **theory and insistence of the plaintiff as to the way and manner** in which this accident occurred to **be true** from a preponderance of the evidence according to the definition of that term which I have already given you, then the defendants would be guilty of negligence and **your verdict would be in favor** of the **plaintiff against all the defendants**" (Tr. 1127) (Emphasis supplied).

The charge as to agency in effect "hammered in the nails in the coffin" insofar as petitioner Flour Mill was concerned; but the charge just quoted above "set the nails so firmly that there was no chance" for any fair consideration of the insistence and defenses presented by petitioner Flour Mill. The Trial Judge by so instructing the jury effectively directed a verdict for the plaintiff against "**all the defendants**" on the basis of "the **way and manner in which the accident occurred.**" To a member of the jury, an average layman, the words, "the way and manner in which this accident occurred" could have no meaning other than a specific reference to the action of driver Johnson in causing the truck to jump backward against the wall, knocking the wall against plaintiff Byrd. As to this "way and manner in which this accident occurred" there was no dispute in the record. Thus, affirmatively and positively and to the prejudice of petitioner Flour Mill, the jury was directed to render a verdict in favor of the plaintiff against this defendant.

IX.

* * * * * * * * *

Petitioner Flour Mill now files with this Petition its Assignments of Error and Brief in support thereof, which petitioner requests to be treated as a part of this Petition.

Assignments of Error (Supreme Court).

I.

The Court of Appeals Erred in Overruling Petitioner's Assignment as to the Trial Judge's Instruction to the Jury as to gency.

It was error for the Court of Appeals to overrule petitioner's Assignment of Error IV (a) in which petitioner assigned as error the action of the Trial Judge in instructing the jury as follows:

> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland **Flour Mills**, Incorporated, was his principal at the time, that is, that he was **acting under their instructions in any manner**, then **that would create an agency**, and in that event you could predicate the liability of the Dixie Portland Flour Mills upon the negligence of James Lee Johnson, provided you find that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Incorporated" (Tr. 1132). (Assignment of Errors and Brief of Flour Mills, pp. 13 and 14). (Emphasis added.)

And further it was error for the Court of Appeals to overrule the second part of that same Assignment of Error presented to that Court, being that part of the Court's

Charge to the jury in which the Trial Judge then instructed as follows:

> "if you find from the proof in this case that the defendant Johnson was the **agent of or servant** of the Dixie Portland **Flour Mills**, Incorporated, at the time and place of this accident, then his acts would be attributable to that defendent" (Tr. 1133). (Assignment of Errors to Court of Appeals, p. 14). (Emphasis added.)

These errors were made the basis of grounds XIX and XX of petitioner's motion for a new trial which the Trial Court disallowed (Tr. 182, 183).

In its Opinion the Court of Appeals refers to this assignment on pages 12 to 14.

In overruling this Assignment that Court mistakenly described this part of the Charge as being considered "ambiguous rather than affirmatively erroneous" (Page 14, Opinion of Court of Appeals filed July 22, 1963). The record when considered in its entirety affirmatively shows that this error affected the result of the trial to the detriment of petitioner Flour Mill.

VII.

(b) It was error and in violation of Sections 6 and 8 of Article 1 of the Constitution of Tennessee and in violation of the Seventh Amendment to the Constitution of the United States for the trial judge to usurp the functions of the jury, and to deprive Flour Mills of due process—the law of the land by affirmatively instructing the jury that Johnson, the employee of the Dixie Feed & Seed Company by acting under the instructions of Flour Mill became the agent of Flour Mill, and that his acts would be attributable to Flour Mills; and also that if the jury

believed the theory and insistence of the plaintiff as to the way and manner in which the accident occurred then the verdict of the jury would be against defendant Flour Mills along with the other defendants. These parts of the charge of the trial judge as delivered by him to the jury are fully set out in Assignments of Error I and VIII of these Assignments here before this Court, and these portions of the charge of the trial court are here incorporated by reference.

VIII.

The Court of Appeals Erred in Overruling Petitioner's Assignment of Error as to the Trial Judge's Instruction to the Jury That if They Believed the Theory and Insistence of the Plaintiff as to the Way and Manner in Which the Accident Occurred the Jury's Verdict Would Be for the Plaintiff Against All Defendants.

It was error for the Court of Appeals to overrule petitioner's Assignment of Error IV (d) in which this petitioner assigned as error this action of the Trial Judge in instructing the jury as follows:

> "However, the Court instructs you that if you believe the theory and **insistence of the plaintiff as to the way and manner in which this accident occurred** to be true from all of the proof as to all of the defendants, that is, by a preponderance of the evidence according to the definition of that term which I have already given you, then the defendants would be guilty of negligence and **your verdict would be** in favor of the plaintiff **against all** of the **defendants** (Tr. 1127). (Petitioner's Assignment of Errors in the Court of Appeals, p. 16 at the top of the page.) (Emphasis added.)

This error was made the basis of ground XVI of the Flour Mills' motion for a new trial (Tr. 147) which motion the Trial Court disallowed (Tr. 182). Here again the Court of Appeals did not make specific reference to this ground, simply "lumping it in" with other grounds relied upon by petitioner with a comment that it was not prejudicial (Court of Appeals' Opinion, July 22, 1963, p. 14).

We respectfully submit that this Charge to the jury by the Trial Judge was prejudicial to the extreme. In effect, it instructed the jury that if they believed (the undisputed facts) that the Feed and Seed Company's driver Johnson left his tractor in gear when, after parking it and stopping it, he cut off the ignition, so that it jumped back, striking the wall and knocking parts of it against Mr. Byrd—that if they believed this was "the way and manner in which the accident occurred", then all of the defendants would be guilty of negligence and the verdict of the jury would be in favor "of the plaintiff against all the defendants."

Thus, the court itself determined that all parties defendant were negligent as a matter of law, thereby depriving the petitioner of its right to have the jury make a determination of the most vital question in the case—whether any defendant was guilty of any actionable negligence. Moreover, this instruction precluded a verdict in favor of any defendant then in the case.

Brief and Argument.

II.

The Verdict and Judgment as to Flour Mill Should Be Set Aside by Reason of Denial of Due Process and Constitutional Rights.

(a)

Section 6 of Article I of the Constitution of Tennessee provides that "trial by jury shall remain inviolate" in the State of Tennessee. Section 17 of the State Constitution provides that no person shall be deprived of his property without due process of law. The Fourteenth Amendment of the United States Constitution does not inherently grant a party a right to a trial by jury, however, it has long been recognized under this Amendment that a person's property cannot be taken from him without due process of law. The due process requirement of the United States Constitution can only be met if the trial on the state level is had according to the settled course of judicial proceedings in that particular state. Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678, and Gunn v. Union R. Co., 62 A. 18, 2 L. R. A., N. S. 362. Therefore, since the state Constitution guarantees a trial by jury as the "settled course of judicial proceedings" in Tennessee, then failure to grant the defendant a trial by jury in the instant case is a violation of the Fourteenth Amendment of the United States Constitution.

In Santi v. Duffey, 40 Tenn. App. 237, 290 S. W. 2d 884, the court held that where the trial court gave an instruction which directed a verdict against the defendant that such an instruction was a misdirection and deprived the plaintiff of his constitutional rights of trial by jury. In the instant case, the trial court directed a verdict by its instructions and consequently removed

from the jury the opportunity to determine whether or not the defendant should be deprived of his property. By the trial court's action the province of the jury was invaded on this pivotal issue, and, conversely, the defendant's right of trial by jury was taken from him. On this issue, alone, this case should be remanded for a new trial.

(b)

By stressing this assignment of error, we do not wish to seem to have waived our insistence that the Trial Court should have directed a verdict for the defendant Flour Mill. However, if the Trial Court was to submit the case to the jury as to Flour Mill, that court should have taken care not to deprive Flour Mill of its constitutional rights. When the court, while ostensibly submitting the issues to the jury, so charged the jury as to in effect direct them to return a verdict against Flour Mill, that court then violated the safeguarding provisions of both the Constitution of the United States and that of the State of Tennessee. When the trial court so erroneously charged the jury as to in effect instruct the jury that Flour Mill should be found liable to the plaintiff, it deprived Flour Mill of that right intended to be preserved by Amendment 7 to the U. S. Constitution—the right for the jury to determine that issue; and for all practical purposes it thus deprived Flour Mill of its property by saying in effect to the jury that a sum of money should be taken from Flour Mill and given to plaintiff. These instructions given by the trial judge were so worded that the only thing left for the determination of the jury was the amount at the verdict—the amount of defendant's property so to be taken. Leaving to the jury only the question of the amount was a violation of the provisions of both Constitutions. They were intended to assure a defendant that issues

of fact would be determined by the jury and that no defendant would be deprived of his property "but by the judgment of his peers of the law of the land."

Where the controlling propositions of law governing the case are not properly stated to the jury our courts have held that this amounts to the denial of the constitutional rights of trial by jury.

> "It is the right of the litigant to have the propositions of law governing the case plainly stated to the jury." Martin v. Castner-Knot Dry Goods Co., 27 Tenn. App. 421, 181 S. W. 2d 638, 642.

In the case just cited the Court concluded from the record that the trial judge had submitted the case to the jury on an "erroneous theory of the law." The Court then held that it must reverse and remand for a new trial despite the provisions of Code Section 10654 (now Tennessee Code Annotated 27:117).

Also in a more recent case, in a case where the trial judge in his charge misstated the law applicable, Judge Felts speaking for the Court said:

> "Under these instructions, the jury were bound to render a verdict against the plaintiff if they found that Mrs. Santi was a guest in the car and was killed by the driver's negligence, as charged in the declaration. Such error simply amounted to a misdirection of the jury, and deprived plaintiff of his constitutional rights of trial by jury." Santi v. Duffey, supra.

The Court here in this case now before this Court, should set aside the verdict of the jury. We feel that the record shows that as to defendant Flour Mill the suit should be dismissed. If we are mistaken in that, then the case should be remanded to the trial court for a new trial.

Petition to Reconsider and Hear and Brief and Argument in Support Thereof.

To the Honorable Supreme Court of the State of Tennessee Sitting at Knoxville or to Any One of the Judges Thereof.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.,
Plaintiffs-in-Error,

v.

Stanifer G. Byrd,
Defendant-in-Error.

Styled as Cause No. 88. Hamilton County Law in the Court of Appeals.

Petition to Reconsider and Hear.

Your petitioner, Dixie Portland Flour Mills, Inc., would respectfully show to the Court that it is much aggrieved by the judgment and action of the Court announced in this case on the 5th day of March, 1964, wherein the Court denied the Petition for Certiorari filed by Dixie Portland Flour Mills, Inc., in this cause.

Petitioner, Dixie Portland Flour Mills, Inc., respectfully directs the attention of the Court to its Assignment of Error VII "The Trial Court and the Court of Appeals erred in denying petitioner Flour Mill due process of law."

By this Assignment petitioner pointed out violations of both the Constitution of the State of Tennessee and the Constitution of the United States of America. This Assignment addresses itself particularly and peculiarly to the Supreme Court of this State, and the errors assigned, though presented in the proceedings in the Court of Appeals, were not specifically ruled on by that Court. The attention of this Court is therefore directed to this Assign-

ment appearing on pages 23 to 25 of the printed Assignment of Error in the Petition for Writ of Certiorari, and to the Brief and Argument presented in that connection commencing on page 49 of said Petition. All of this material is here incorporated by reference.

It is earnestly insisted on behalf of the Petitioner that this Court should grant the Petition for Writ of Certiorari, and grant a hearing on these and the other Assignments. The history and facts of this case, the seriousness of the matters involved, and the gravity of the errors indicated, all combine to justify this Court granting the Petition and fully hearing the cause.

Petitioner further would show that the State Court jurisdiction as to the constitutional questions rests primarily, if not exclusively, in the Supreme Court of this State. Petitioner believes that its Assignment in this connection is well grounded. If this Court fully hears this cause, it is the hope of petitioner that a further appeal or petition to the Supreme Court of the United States will be unnecessary.

Petitioner Therefore Prays:

(1) That this Honorable Court reconsider, and that it reverse and set aside the action heretofore taken on March 5, 1964; and

(2) That this Court now grant the Writ of Certiorari and fully hear this case.

Strang, Fletcher, Carriger & Walker,

By: .....

Attorneys for Petitioner, Dixie Portland Flour Mills, Inc.

The Court of Appeals seems to have given no serious consideration to the actions of the Trial Judge, John T. Mahoney, which deprived the defendant, Dixie Portland Flour Mills of its constitutional rights to due process of law. In taking that approach, that Court may have recognized that the major responsibility in Tennessee for determining such constitutional questions rests on our Supreme Court. In any event we respectfully direct this Court's attention to and here incorporate by reference the citations and arguments presented on pages 49 to 52, inclusive, of our Brief in the printed Petition for Writ of Certiorari.

Some years ago in an opinion by Mr. Justice Green, this Court said that "when any question involving the constitutionality of an act of the legislature is *bona fide* made and relied on in a case, the Supreme Court should take Appellate jurisdiction," and that the decision of such a constitutional question was for this Court rather than for the Court of Appeals (Memphis Street Railway Co. v. Rapid Transit Co., 133 Tenn. 83, 104 and 105, 179 S. W. 635). A statute then in effect seems to have directed that the Supreme Court take jurisdiction, but it is significant that in the official reporting of that decision the words "bona fide" are in italics. In the case now before this Court, this is truly a **bona fide question and assignment.**

We did not attempt to deprive the Court of Appeals of jurisdiction by reason of the constitutional questions. However, those matters were then and are now relied upon in good faith, and merit consideration and determination.

Mr. Justice Neil in an opinion delivered in 1945 approved the definition of "due process" condensed into one sentence:

"In judicial proceedings due process of law means a course of proceeding according to those rules and principles which have been established for the protection and enforcement of private rights."—Tenn. Cent. Ry. Co. v. Pharr, et al., 183 Tenn. 658, 663, 194 S. W. 2d 486.

As to those parts of the assignment charging violations of the provisions of the Federal Constitution it seems clear that this Court should act to protect and enforce those rights to which this petitioner is lawfully entitled.

In an opinion written by Mr. Justice Black referring to the Federal Constitution, the Supreme Court of the United States has said:

"That Constitution is the supreme law of the land, and 'upon the state courts equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution.'"

Smith v. O'Grady, 312 U. S. 329, 61 S. Ct. 572, 573 85 L. Ed. 859;

Quoting in part from Mooney v. Holohan, 294 U. S. 103, 113, 55 S. Ct. 340, 79 L. Ed. 791.

We respectfully ask that this Court now reconsider, grant the Petition for Writ of Certiorari and hear this cause.

Respectfully submitted,

Strang, Fletcher, Carriger & Walker,

By: John S. Carriger,

Attorneys for Petitioner,

Dixie Portland Flour Mills, Inc.

Application for Leave to File Second Petition for Rehearing.

To the Honorable Supreme Court of the State of Tennessee Sitting at Knoxville or to Any One of the Judges Thereof.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc., Plaintiffs-in-Error, vs. Stanifer G. Byrd, Defendant-in-Error.	Styled as Cause No. 88. Hamilton County Law, in the Court of Appeals.

Application of Dixie Portland Flour Mills, Inc., for Leave to File a Second Petition for Rehearing.

Comes now Dixie Portland Flour Mills, Inc. (a plaintiff-in-error), by its attorneys, Strang, Fletcher, Carriger & Walker and O'Neil, Jarvis, Parker & Williamson, and respectfully petitions this court, or any of the judges thereof, to grant special leave for the filing of a Second Petition for Rehearing pursuant to Rule 32 of the Rules of the Tennessee Supreme Court, and as grounds therefor states, *inter alia*:

1. That this honorable court in denying the Petition for Certiorari has in effect permitted the Court of Appeals to enunciate a hitherto non-existent common law duty and impose that duty upon the appellant.

2. The Court of Appeals has permitted to stand reversible error committed by the trial court inconsistent with controlling Tennessee decisions on each assignment of error raised.

3. The action of the trial court and the Court of Appeals has effectively abridged the constitutional rights of the applicant, both state and federal.

Wherefore, your applicant respectfully prays that this court give an order granting special leave to the applicant to file a Second Petition for Rehearing in this cause.

Dixie Portland Flour Mills, Inc.,
By Howard F. Jarvis,
Counsel,
By John S. Carriger,
Counsel.

Strang, Fletcher, Carriger & Walker,
O'Neil, Jarvis, Parker & Williamson,
Of Counsel for Plaintiffs-in-Error.

Second Petition for Rehearing.

To the Honorable Supreme Court of the State of Tennessee sitting at Knoxville or to any one of the judges thereof.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.,
Plaintiffs-in-Error,
vs.
Stanifer G. Byrd,
Defendant-in-Error.

Styled as Cause No. 88. Hamilton County Law in the Court of Appeals.

Second Petition of Dixie Portland Flour Mills, Inc., for Rehearing.

The petitioner, Dixie Portland Flour Mills, Inc., respectfully moves that this honorable court Reconsider and

Hear its Petition for Certiorari previously filed in this case and as grounds in support thereof states:

Basic Facts.

Petitioner, Dixie Portland Flour Mills, Inc., owned and operated a grain elevator and in connection therewith it maintained certain driveways and a lot surrounded in part by a concrete block wall. Dixie Feed and Seed Company (not affiliated or connected in any way with the petitioner) operated a certain tractor trailer unit, the loaded weight having exceeded 30 tons, which, on the 11th day of July, 1960, delivered a load of grain to Dixie Portland's warehouse. While parking to wait for other trucks to complete the weighing in and loading or unloading operations, the driver of said tractor trailer backed his truck to a stop with the rear end within one foot of the concrete block wall and when he removed his foot from the clutch, after having turned off the ignition, the unit jumped backward with the motor still running and struck the wall, knocking part of it out onto the sidewalk and street. Plaintiff, who was walking along the sidewalk, adjacent to the wall, was struck by the falling parts of the wall and seriously injured. This was the "way and manner" in which this accident occurred and this was plaintiff's "theory and insistence" of the "way and manner" in which it occurred, and, likewise it was the "way and manner" in which all parties insisted that it occurred. In other words, there was absolutely no dispute as to the "way and manner" in which the accident occurred. All parties agreed and all of the evidence in the case conclusively showed, without any basis whatever for even an inference that the accident occurred in any other way or manner, that this was the "way and manner" in which the accident occurred.

Thus, it is beyond dispute that there was no issue as to the "way and manner" in which the accident occurred.

The dispute and issue involved was why the accident occurred, whether because of the negligence of one or more of the defendants.

I.

In denying certiorari, this honorable court has overlooked and failed to consider that a hearing on petitioner's contentions that its basic and fundamental constitutional rights to trial by jury and due process of law under both State and Federal Constitutions has been denied by the lower courts and in the absence of a review by this court, petitioner is denied the right to a consideration of and a ruling upon these important and basic questions. The basic and fundamental constitutional questions involved are, in substance, as follows:

The issues involved, which the parties were entitled to have the jury decide, as pointed out by the opinion of the Court of Appeals when they said "It is clear that, under the proof, the questions of common law negligence and proximate cause were for the jury" (Op. p. 11), were (1) whether the defendants were guilty of any acts or omissions which constituted negligence, and (2) whether such negligence, if any, was a direct or contributing proximate cause of plaintiff's injuries.

There was no dispute whatever as to the "way and manner in which this accident occurred." All parties pleaded, insisted and their evidence showed that plaintiff's injuries were sustained as the result of the Dixie Feed truck striking the concrete block wall of Dixie Portland's lot and knocking parts thereof against plaintiff who was walking on the sidewalk adjacent to the wall. **Absolutely no question existed as to the "way and manner" in which the accident occurred.**

In a verdict directing instruction, complete within itself, the court instructed the jury that if they found and

believed that "the theory and insistence of plaintiff as to the way and manner in which this accident occurred" was true, "then defendants would be guilty of negligence and your verdict would be in favor of the plaintiff and against all of the defendants" (Tr. 1127).

The court also instructed the jury that "you are to take the law as given you and charged by the court."

Since it would have been impossible for the jury to have avoided the conclusion that the accident occurred in the "way and manner" contended for by plaintiff (there being no evidence or inference supporting a contrary or different conclusion) this instruction amounted to a direction of a verdict in favor of plaintiff and against all defendants. Naturally, the jury followed this mandate and rendered such a verdict. In so directing a verdict, without requiring the jury to decide the real issues in the case, the trial court deprived the defendants of their constitutional right to trial by jury as provided for by Sections 6, 8, 17 of Article I of the Constitution of Tennessee.

In holding that no prejudicial error was committed by the giving of the verdict directing instruction quoted in Point I above, the decision of the court of appeals fails to follow and is directly contrary to and in conflict with **Santi v. Duffey**, 290 S. W. 2d 884, 40 Tenn. App. 237, which holds that a verdict directing instruction which misdirects the jury amounts to a deprivation of a party's constitutional right to a trial by jury and requires reversal of the case.

II.

The decision of the Court of Appeals disposed of petitioner's contention that the above instruction was prejudicially erroneous and constituted the direction of a verdict by merely saying,

"Other assignments relating to the charge have been considered and found to be without merit because not shown to be prejudicial in view of the undisputed evidence of common law negligence or because not included in the motion for a new trial."

The Motion for a New Trial, Assignment XVI on page 14 thereof, specifically raises the error in the giving of this verdict directing instruction. There was no undisputed evidence of common law negligence and the only undisputed evidence was as to the "way and manner" in which the accident occurred.

Thus, as the Record stands, by refusing certiorari, this court has inferentially found nothing wrong with the court of appeals decision, despite the fact that it refuses to rule upon this important constitutional question for two stated reasons, both of which are shown by the Record to be without foundation. Moreover, since the court of appeals further held that "it is clear that, under the proof, the questions of common law negligence and proximate cause were for the jury" (Op. p. 11), the effect of their ruling is that it is not prejudicial error to give an erroneous verdict directing instruction, containing a positive misdirection, if there is undisputed evidence of common law negligence (Op. p. 14) which presents a jury question. In so holding, the court of appeals announces a unique principle of law and overlooks and fails to follow the decisions in **Santi v. Duffey**, 290 S. W. 2d 884, 40 Tenn. App. 237; **Nashville Ry. & Light Co. v. Dungey**, 128 Tenn. 587, 163 S. W. 802; **McClaird v. Reid**, 229 S. W. 2d 505, 190 Tenn. 337.

III.

In holding that an instruction to the effect that if the Dixie Feed driver, co-defendant Johnson, was acting under petitioner Dixie Portland's "instructions in any manner,

then that would create an agency, and in that event, you could predicate the liability of Dixie Portland Flour Mills, Inc., upon the negligence of James Lee Johnson" (Op. pp. 12-13), was proper and did not constitute prejudicial error, the Court of Appeals completely failed to consider or follow the following controlling decisions of this state which announce the rule that far more than mere "instructions in any manner" is required to establish agency. **Income Life Ins. Co. v. Mitchell**, 168 Tenn. 471, 79 S. W. 2d 572; **Powell v. Construction Co.**, 88 Tenn. 692, 13 S. W. 391; **Knight v. Hawkins**, 26 Tenn. App. 448, 173 S. W. 2d 163; **Gulf Refining Co. v. Huffman**, 155 Tenn. 580, 297 S. W. 199; **Smart v. Embry**, 208 Tenn. 686, 348 S. W. 2d 322.

Plaintiff charged that the Dixie Feed driver Johnson was also the agent of petitioner Dixie Portland. The only evidence produced was to the effect that on Johnson's first trip to Dixie Portland Mill months before this accident, a foreman of the Flour Mill told Johnson what area of the lot to park in when waiting his turn to weigh in. Plaintiff's evidence also showed that Johnson was not told or instructed where to park on the day of the accident. In fact, on that day there was no employee of the Flour Mill present (Tr. 582). On the basis of this evidence, standing alone, the trial court gave the following instruction:

> "Now, if you find that the defendant, James Lee Johnson, has been guilty of negligence, and if you further find that if the co-defendant, Dixie Portland Flour Mills, Incorporated, was his principal at the time, that is, that he was acting under their instructions in any manner, then that would create an agency, and in that event you could predicate the liability of the Dixie Portland Flour Mills upon the negligence of James Lee Johnson, provided you find

that Johnson was, at the time of this accident, the agent of the Dixie Portland Flour Mills, Incorporated" (Tr. 1132). (Assignment of Errors and Brief of Flour Mills, pp. 13 and 14.)

In overruling petitioner's contention that the above charge was prejudicially erroneous, the Court of Appeals said:

> "At first blush, it seems erroneous to consider Johnson the agent of the Flour Mills. However, the Record shows that one reason for lining up the trucks near the wall as they entered the premises was to prevent congestion which might interfere with the movement of trucks out of the plant carrying the finished product of the Flour Mills. **To that extent, it had an interest in the parking of trucks near the wall and to that limited extent we think if Johnson acted under the instructions of the Flour Mills he might be considered its agent**" (Op. pp. 13-14).

The Opinion cites no authority for any such rule and we have been unable to find any such rule announced by any authority in any jurisdiction in this country.

Moreover, the opinion of the Court of Appeals, while stating that, "we think it would have been better either to have omitted this charge altogether" (Op. p. 14) further concluded that, "it does not affirmatively appear that this portion of the charge affected the result of the trial" and that "we think it most unlikely that the jury gave any consideration to whether Johnson acted as agent for the Flour Mills in parking the truck and cutting the switch in such close proximity to the wall, as charged. The charge is not necessarily to be taken as leaving that question to the jury and, therefore, is to be considered ambiguous rather than affirmatively erroneous" (Op. p. 14). What is ambiguous about this instruction? In clear and concise language it tells the jury in no unmistakable terms that,

if they find that Johnson was negligent, and, that he was acting under Dixie Portland's instructions in any manner, then that would create an agency and make Dixie Portland Johnson's principal at the time, in which event the jury could predicate the liability of Dixie Portland upon Johnson's negligence.

We respectfully submit that this is clearly an erroneous statement of the law of agency of Tennessee as announced by the above authorities and that the rights of this petitioner were necessarily prejudiced by the giving thereof.

Petition for Stay of Execution, as Amended.

To Any of the Judges of the Eastern Section of the Court of Appeals of Tennessee.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.,

v.

Stanifer G. Byrd.

} Hamilton Law.

Petition of Dixie Portland Flour Mills, Inc., for Stay of Execution.

(Filed Apr. 16, 1964, W. H. Eagle, Clerk.)

Comes the Dixie Portland Flour Mills, Inc., one of the defendants, against whom a judgment for damages has been rendered in this cause, through its attorney, John S. Carriger, and petitions this Court, or any of the Judges thereof, to grant to this Petitioner a stay of execution, pursuant to Title 28, Section 2101 of the U. S. Code Annotated, for a sufficient time to enable it to obtain a

Writ of Certiorari from the Supreme Court of the United States.

Petitioner is operating a successful and long established business in Chattanooga, Tennessee, and its counsel is informed and on information and belief avers that it is fully solvent and amply able to pay "any damages and costs" which Stanifer G. Byrd may sustain by reason of the stay as mentioned in said Code Section, in the event it finally should be required to make such payment. Petitioner therefore asks that the stay not be conditioned on the giving of any security.

This 15th day of April, 1964.

Dixie Portland Flour Mills, Inc.,
By: John S. Carriger,
Attorney.

State of Tennessee, }
County of Hamilton. }

John S. Carriger, one of the attorneys for Petitioner, makes oath in due form of law that the statements in the foregoing Petition made of his own knowledge are true and that those made on information and belief he believes to be true.

John S. Carriger.

Sworn to and subscribed before me this 15th day of April, 1964.

Mary L. Baker,
Notary Public.

My Commission expires: Jan. 8, 1968.

I certify that I have served a copy of this Petition on H. Keith Harber, Attorney for Stanifer G. Byrd, by

placing in the U. S. Mail, with proper postage affixed a true copy thereof addressed to him at his office in the Pioneer Bank Building, Chattanooga, Tennessee.

This 15th day of April, 1964.

John S. Carriger.

To Any of the Judges of the Eastern Section of the Court of Appeals of Tennessee.

Dixie Feed & Seed Company, Inc., James Lee Johnson and Dixie Portland Flour Mills, Inc.,

v.

Stanifer G. Byrd.

} Hamilton Law.

Amendment to Petition of Dixie Portland Flour Mills, Inc., for Stay of Execution.

(Filed May 8, 1964, W. H. Eagle, Clerk.)

Comes the Dixie Portland Flour Mills, Inc. and amends its Petition heretofore filed for stay of execution as follows:

(1) By striking therefrom the last sentence in the second paragraph and substituting in lieu thereof the following:

"Petitioner tenders herewith and asks approval of the Supersedeas Bond in the amount of Three Thousand Twenty-five Thousand ($325,000.00) Dollars with General Insurance Company of America as surety and with power of attorney duly attached, which Bond has been executed and will be tendered to the Judge hearing this Petition, at the hearing."

(2) By adding to said original Petition an additional paragraph as follows:

"Petitioner files herewith and incorporates by reference a partial listing of grounds which Petitioner expects to include in its Petition for Writ of Certiorari. Petitioner avers that it believes that it has a proper and substantial federal question which should be reviewed by the United States Supreme Court and that such question was actually and reasonably raised."

Dixie Portland Flour Mills, Inc.,
By: John S. Carriger,
Attorney.

State of Tennessee,
County of Hamilton.

John S. Carriger, one of the attorneys for Petitioner, makes oath in due form of law that the statements in the foregoing Petition made of his own knowledge are true and that those made on information and belief he believes to be true.

John S. Carriger,

Sworn to and subscribed before me this 4 day of May, 1964.

Louise Falkner.
Notary Public.

My Commission expires: 11-17-65.

I certify that I have served a copy of this Petition on H. Keith Harber, Attorney for Stanifer G. Byrd, by delivering a true copy thereof to him, in Chattanooga, Tennessee, this 4th day of May, 1964.

John S. Carriger.

Court met pursuant to adjournment present and presiding the Honorable Judges Luke M. McAmis, Robert E. Cooper and James W. Parrott, when the following proceedings were had to-wit:

Monday, May 11th, 1964.

In the Court of Appeals of Tennessee, Eastern Section.

May Term 1964.

Dixie Feed & Seed Company, Inc., James Lee Johnson, and Dixie Portland Flour Mills, Inc., Plaintiffs-in-Error, v. Stanifer G. Byrd, Defendant-in-Error.	Hamilton Law. No. 88.

Order.

(Filed May 11, 1964, W. H. Eagle, Clerk.)

This cause came on to be heard on the petition and amendment thereto filed by Plaintiff-in-Error, Dixie Portland Flour Mills, Inc., a Supersedeas Bond in the amount of Three Hundred Twenty-five Thousand ($325,000.00) Dollars having been tendered, for a stay of execution of the judgment in this case for a period of time sufficient within which to obtain a Writ of Certiorari from the Supreme Court of the United States. Briefs have been submitted and counsel heard for the parties.

The Court finds that no substantial Federal question reviewable by the United States Court has been actually and reasonably raised by petitioner.

The Petition is, therefore, denied. The exception of petitioner to this finding, action and order is noted. Costs incident to the filing of this petition are adjudged against Dixie Portland Flour Mills, Inc.

Enter this 8th day of May, 1964.

R. E. Cooper,
Robert E. Cooper, Judge.

Strang, Fletcher, Carriger & Walker,

By: John S. Carriger,
Attorney for Dixie Portland Flour Mills, Inc.

H. Keith Harber,
Attorney for Stanifer G. Byrd.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 254.

DIXIE PORTLAND FLOUR MILLS, INC.,
Petitioner,

vs.

STANIFER G. BYRD,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee, Eastern Section.

BRIEF

For the Respondent in Opposition.

H. KEITH HARBER,
400 Pioneer Building,
Chattanooga, Tennessee 37402,
Attorney for Respondent.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 254.

DIXIE PORTLAND FLOUR MILLS, INC.,
Petitioner,

vs.

STANIFER G. BYRD,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee, Eastern Section.

BRIEF

For the Respondent in Opposition.

The respondent, Stanifer G. Byrd, herewith replies to the petition for writ of certiorari filed on behalf of the defendant, Dixie Portland Flour Mills, Inc.

OPINIONS BELOW.

The opinion of the Court of Appeals of Tennessee is reported at 376 S. W. 2d 745.

JURISDICTION.

There is no jurisdiction to review the action of the Tennessee courts in this case since the alleged federal questions were neither properly raised by petitioner in the state court nor determinative of the issues before the state courts.

QUESTIONS PRESENTED.

Assuming the undisputed facts contained in the record and cited in the statement herein, the questions are:

1. Where a state trial court charges a jury on the factual theories of proof of the respective litigants as to negligence and agency, which charge is later affirmed by the state appellate court, will the Supreme Court of the United States undertake a review of the legal sufficiency of the jury charge?

2. Where an alleged federal question is for the first time asserted on petition for writ of certiorari to the highest court of a state, following a jury trial and affirmance by an intermediate appellate court, does the mere denial of the petition within itself violate due process of law?

STATEMENT.

The alleged federal questions referred to in the petition were not raised at any time during the trial (R. 188-1181), in the motion for new trial in the trial court (R. 130, 172, 173), nor in the assignments of error to the Court of Appeals of Tennessee (R. 1185). The first mention of the alleged federal questions here asserted was contained in the petitioner's petition for writ of certiorari to the Supreme Court of Tennessee.

The charge of the trial judge to the jury is 28 legal pages in length (R. 1111-1139). Petitioner complains of 18 lines of this charge on which it asserts violation of federal due process as contained in questions 1 and 2, pages 3 and 4 of the petition.

The theory and insistence of each party to the suit as to the factual occurrence was given the jury in the court's charge (R. 1127-28).

Agency was proven by factual evidence both by the petitioner's foreman, Mr. Jones, (R. 523-528; 569-571) and by the driver Johnson (R. 1042).

The concrete block wall involved was altered, repaired, and maintained by petitioner as required by the terms of petitioner's 30-year lease (R. 1026-1028), which duty was admitted by petitioner's counsel at trial (R. 286-287).

Petitioner changed the use of the area surrounded by the wall from north-south parking for automobiles under roof with wheelstops to east-west parking for tractor-trailer units within the remaining walls after removal of the roof from the structure without wheelstops (R. 1021-1025 and 620-621). Petitioner did not obtain a building permit from the City of Chattanooga as required by ordinance to change the use of the property and did not comply with the pertinent ordinance regulations with respect to safety

for the new use (R. 644-648 and 1026). The building inspector for the City of Chattanooga testified he would not have permitted the change unless wheelstops were included in the proposed alterations (R. 652).

Proof was introduced to show that the failure to install wheelstops for the new use was lack of ordinary care (R. 341, 578, 611-613, and 1014). Such failure was also proven violative of applicable city ordinances (R. 634-636, 657-658, 667-688, and 1019).

No wheel stops or any barriers were provided near the west wall in the area for the new use of parking tractor-trailers (R. 341).

The wall was inadequate for the proposed use in that it was too high for its width and was unstable (R. 611 and 1013).

Petitioner offered no proof in defense to the respondent's evidence.

ARGUMENT.

Factual questions of negligence were presented to the jury with respect to maintenance, alteration, and repair of petitioner's wall. Likewise, factual proof of the driver's agency per instructions from the petitioner's foreman was presented to the jury. City ordinances were pled and proven and proof introduced that petitioner violated same, proximately causing respondent's injury. **Petitioner elected to offer no proof in defense.**

The factual proofs of negligence therefore went to the jury following the court's charge.

The entire charge on the agency question consisted of 43 lines in the original trial transcript, and the part objected to consisted of less than 10 lines, which were literally buried in a complicated discussion of the various possibilities of the agency relationship among the several defendants at trial (R. 1132-1133).

The theory and insistence of each party was argued to the jury by respective counsel and included in the court's charge in a review of the pleadings (R. 1111-1125). Immediately following the paragraph complained of by petitioner at R. 1127 and continued on R. 1128, the trial judge instructed the jury in almost identical language the theory and insistence of the petitioner. Equal jury instruction as to the theory of each party was thus included in the charge. **Shotwell Mfg. Co. v. U. S.**, 371 U. S. 341, 9 L. Ed. 2d 357 at 374, 83 S. Ct. 448, rehearing denied 372 U. S. 950, 9 L. Ed. 2d 975, 83 S. Ct. 931. The **reference** of the trial judge in his jury instruction to the jury as to the way and manner, theory and insistence of each party was to **proximate negligence**, not to whether or not a truck knocked over petitioner's wall. The only defense in the pleadings by petitioner in the trial below was that its co-defendant caused respondent's injury, and petitioner offered no proof even as to this.

It is fundamental that a court's charge to a jury must be construed as a whole and never by parts in isolation. **Southern Fire & Casualty Co. v. Norris**, 35 Tenn. App. 657, 250 S. W. 2d 785; **Letellier-Phillips Paper Co. v. Fiedler et al.**, 32 Tenn. App. 137, 222 S. W. 2d 42; **Capital Airlines, Inc. v. Barger**, 47 Tenn. App. 636, 341 S. W. 2d 579.

A fair reading of the jury charge, taken in its actual context and true perspective, shows that all the trial judge said and all that could reasonably be implied from his choice of words, was that, if the jury chose to believe what the respondent claimed to be the proximate cause of the accident and if this was found to be negligent, it should bring in a verdict for the respondent against that defendant. the petitioner herein.

It is not inappropriate at this point to quote the language of the same section of the Tennessee Court of Appeals in a case decided in 1953:

> "Nor do we find any merit in the insistence made on behalf of the Clynes Estate that the court unduly emphasized the plaintiffs' side of the case. The court's charge consisted of approximately 75 pages of the record, in which was fairly stated the theory of all the parties, and in the absence of an affirmative showing we think that it may be assumed that the jury properly considered the charge as a whole rather than disjointed parts of it. Under Code Sec. 10654 (now T. C. A. 27-117), this court will not reverse or set aside a judgment for an alleged error in the charge unless it shall affirmatively appear that the error complained of affected the results of the trial." **Monday v. Millsaps**, 37 Tenn. App. 371, 264 S. W. 2d 6.

Also appropriate is the language in **Santi v. Duffey**, 40 Tenn. App. 237, 290 S. W. 2d 884 at 888 (cited by petitioner):

> "It is true our Harmless Error Statute, Act 1911, 1932 Code, Section 10654, T. C. A. 27-117, forbids us to reverse for any error unless it affirmatively appears that such error affected the results of the trial, Under the old rule, errors in jury trials were presumed to be prejudicial unless proven to be harmless; under this statute, such **errors are presumed to be harmless unless shown to be prejudicial.**" (Citing authorities.) (Emphasis added.)

No reason is suggested in petitioner's argument as to why the portion of the charge complained of dealing with the theory of respondent compelled a verdict for the respondent against petitioner any more than the succeeding paragraph at R. 1127-28 should have compelled a verdict for all of the defendants, including petitioner, against the respondent.

The Tennessee appellate procedure from the Court of Appeals to the Supreme Court is governed by Tennessee Code Annotated, Section 27-819 as follows:

> "Review of Court of Appeals by Supreme Court.—
>
> The Supreme Court, or any judge thereof, shall have the right to require, by certiorari, the removal to that court for review of any case that has been finally determined in the Court of Appeals, upon a sworn petition for this purpose filed in the Supreme Court, which petition shall state the substance of the case to be decided, and shall be accompanied by assignments of error and brief in conformity with such rules as the Supreme Court may prescribe; and there shall be no other method of review."

If complaint is to be made in the Tennessee appellate court of any matter during the progress of a trial, such complaint must be brought to the attention of the trial

judge within the motion for a new trial." **National Life & Accident Insurance Co. v. Atwood**, 29 Tenn. App. 141, 194 S. W. 2d 350.

The court, in the **Atwood** case, as to appellate procedure in Tennessee at page 353 said:

> "As applied to procedural changes governing the right of appeal the rule is that, where due provision has been made for the preservation of essential rights, the procedure for review or the extent of review are so far within the power of the legislature as to preclude the raising of questions of due process with respect to the method or procedure for review, the parties entitled to review, or the character of review in the appellate court."

This Court held that a determination by a state court such as quoted above from the **Atwood** case is conclusive on the United States Supreme Court in **Pittsburg, C. C. & St. L. Rwy. Co. v. Backus**, 154 U. S. 421, 38 L. Ed. 1031, 14 S. Ct. 114, and the Court said, at page 427:

> "If a single hearing is not due process, doubling it will not make it so • • •"

See also: **Lott v. Pittman**, 243 U. S. 588, 37 S. Ct. 473, 61 L. Ed. 915; and **Reetz v. Michigan**, 188 U. S. 505, 23 S. Ct. 390, 47 L. Ed. 563, where this Court said:

> "Neither is the right of appeal essential to due process of law."

For similar decisions in Illinois see: **Bagdonas, et al. v. Liberty Land and Investment Co.**, 309 Ill. 103, 140 N. E. 51; and **McGinnis v. McGinnis** (1919), 289 Ill. 608, 124 N. E. 562.

The rule is well established by this Court that, "Where the decision of the state court might have been either on a state ground or on a federal ground and the state

ground is sufficient to sustain the judgment, the Court will not undertake to review it": **Williams v. Kaiser,** Mo., 1945, 65 S. Ct. 363, 323 U. S. 471, 89 L. Ed. 398, at 403, and authorities cited therein; and see **Cramp v. Board of Public Instruction of Orange County, Florida,** Fla., 1961, 82 S. Ct. 275, 368 U. S. 278, 7 L. Ed. 2d 285 at 288. And this is true "notwithstanding the copresence of federal grounds": **Fay v. Noia,** 372 U. S. 391, 9 L. Ed. 2d 837 at 863, 83 S. Ct. 822. See also **Herb v. Pitcairn,** 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459. Furthermore, "Where the highest court of the state delivers no opinion and it appears that the judgment **might** (sic) have rested on a non-Federal ground, this court will not take jurisdiction to review the judgment": **Stembridge v. State of Georgia,** Ga., 1952, 72 S. Ct. 834, 343 U. S. 541, 96 L. Ed. 1130, and authorities cited therein at 96 L. Ed., page 1130.

The federal question, if any, was not properly raised. Inasmuch as the "question" is basically one of the constitutionality of the trial court's "verdict directing charge", it should have been raised immediately after the charge was delivered or at the latest in petitioner's motion for a new trial, which in none of its 57 grounds makes reference to the denial of petitioner's constitutional rights. Under established Tennessee law, the appellate courts had the right and duty to ignore this basis of error: **Monday v. Millsaps,** 37 Tenn. App. 371, 264 S. W. 2d 6, at page 21; **Bennett v. Monroe County Motor Co.,** 191 Tenn. 345, 233 S. W. 2d 55; **Savage v. Spur Distributing Co., Inc.,** 33 Tenn. App. 27, 228 S. W. 2d 122; **Vest, et al. v. Bitner,** 34 Tenn. App. 575, 241 S. W. 2d 438; Rules, Tennessee Court of Appeals, 11 (5); Rules, Supreme Court of Tennessee 14 (5).

Under Tennessee law, a judge cannot be put in error with respect to a matter upon which he did not rule:

Garner, et al. v. State, 37 Tenn. App. 510, 266 S. W. 2d 358. The authorities listed in footnote 3, page 8, of the petition in these proceedings, are not in point as they limit themselves to patently unconstitutional statutes and suits depending upon patently inequitable bases.

Petitioner seeks to overturn the decision of the trial court and Court of Appeals, and the refusal of the Tennessee Supreme Court to review such decisions, on a basis that was never brought to the attention of the courts to whom the error is charged by the petitioner, despite adequate opportunity on the petitioner's part so to do. This Court "will not undertake to review what the court below did not decide": **Walters v. St. Louis**, Mo., 1954, 74 S. Ct. 505, 347 U. S. 231, 98 L. Ed. 660 at 664; **Michel v. Louisiana**, La., 1955, 76 S. Ct. 158, 350 U. S. 91, 100 L. Ed. 83 at 93; rehearing denied, 76 S. Ct. 340, 350 U. S. 955, 100 L. Ed. 831. Where a federal question, although referred to in the assignments of error in the state appellate court (in this instance, the Supreme Court of Tennessee only) and in the Federal Supreme Court, the latter cannot consider same where it does not appear that the state court dealt with the question, and it may have refused to do so on the ground that it was not raised in the trial court: **Cox v. Texas**, Tex., 1906, 26 S. Ct. 671, 202 U. S. 446, 50 L. Ed. 1099. See also: **McGarrity v. Delaware River Bridge Commission**, 292 U. S. 19, 78 L. Ed. 1095, 54 S. Ct. 565, rehearing denied, 292 U. S. 607, 54 S. Ct. 771, 78 L. Ed. 1468; **Ellis v. Dixon**, 349 U. S. 458, 99 L. Ed. 1231, 75 S. Ct. 850.

We refer also to a situation somewhat analogous to the case at bar, which was discussed in **Pennsylvania Railroad Co. v. Illinois Brick Co.**, 56 S. Ct. 556, 297 U. S. 447, 80 L. Ed. 796, rehearing denied 56 S. Ct. 666, 297 U. S. 728, 80 L. Ed. 1011, wherein the Court said (80 L. Ed. 804):

> "As the highest court of the State declined to consider them (the constitutional questions) because not

raised in the Circuit Court or presented to it in accordance with practice that unquestionably was well established and reasonable, this Court is without jurisdiction to consider either of them (citing authorities)."

At page 10 of the petition, petitioner relies on three decisions of this Court as authority for the right to review the decision of the Tennessee Court of Appeals herein, to-wit: **American Railway Express Company v. Commonwealth of Kentucky**, 273 U. S. 269, 273, 71 L. Ed. 639, 672, 47 S. Ct. 353, 355; **Demorest v. City Bank Farmers Trust Co.**, 321 U. S. 36, 88 L. Ed. 526, 64 S. Ct. 384; **Broad River Power Co. v. South Carolina**, 281 U. S. 537, 74 L. Ed. 1023, 50 S. Ct. 401. After reading each of these cases with great care, we respectfully draw the Court's attention to the following statement of Mr. Justice McReynolds in the **American Railway Express Co.** case:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law." (Citing authorities.) 71 L. Ed., p. 641.
>
> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law." (Citing authorities.) 71 L. Ed. 642. (cf. **Herb v. Pitcairn**, 324 U. S. 117, 125, 126, 89 L. Ed. 789, 794, 795, 65 S. Ct. 459.)

Likewise, we invite the Court's attention to the majority opinion of Mr. Justice Stone in the **Broad River Power Co.** case, 74 L. Ed. at 1030:

> "But if there is no evasion of the constitutional issue (citing authorities), and the non-Federal ground

> of decision has fair support (citing authorities), this court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court."

It is to be noted that since the alleged constitutional questions were not presented to the Tennessee Court of Appeals, either on the initial appeal or on the petition to rehear in that court, there could have been no evasion of same. We are, therefore, constrained to refer to Mr. Justice McReynolds' remarks in the **American Railway Express Co.** case, supra:

> "The grounds upon which the court of appeals rested its judgment are not revealed—there was no opinion. Consequently, petitioner's argument which rests upon alleged assumptions is impertinent." 71 L. Ed. 641.

We have carefully studied **Demorest v. City Bank Farmers Trust Co.**, cited at page 10 of the petition, and cannot perceive its application to the case at bar. In substance, the **Demorest** case holds that this Court will grant certiorari to review a state statute claimed to be unconstitutional as violative of the due process and equal protection clauses of the 14th Amendment, a proposition of law with which we have neither occasion nor inclination to disagree.

Under the caption, "How Federal Question is Presented", petitioner states in its brief at page 7 that it had "no basis for believing that the Court of Appeals of Tennessee would affirm the judgment of the trial court . . .". Petitioner overlooks the long-established principle that, where the verdict in the trial court is supported by evidence, the verdict is conclusive of the case on appeal: **Lucky et al. v. Gowan**, 46 Tenn. App. 392, 330 S. W. 2d 45, and authorities there listed, and that in de-

termining, on appeal, the sufficiency of the evidence to support the verdict, the evidence must be accepted in the light most favorable to the party successful below.

The only conclusion we can draw from petitioner's above-quoted statement is that it is put forward as a rationalization for petitioner's failure seasonably to make a federal issue of the alleged impropriety in the judge's charge on the agency of Johnson for the petitioner, Dixie Portland Flour Mills, Inc. The petitioner could have raised the present issues immediately after the judge delivered his charge, or in the motion for a new trial, or in its assignments of error in the Court of Appeals, or in its petition to rehear in the Court of Appeals. As the record shows, petitioner made no effort to do so. In this connection, we respectfully refer the Court to the language of the Tennessee Supreme Court in **Carney v. Cook** (1929), 158 Tenn. 333, 13 S. W. 2d 322 at 325:

> ". . . counsel engaged in a trial should aid the court by calling his attention to an abstraction or an inadvertence in delivering his instructions to the jury, and, where they fail to do so, this court will not reverse unless convinced that the party complaining has been prejudiced by such instruction, or that justice is about to miscarry."

and to the opinion below of the Court of Appeals in the instant case.

We suggest that it is immaterial that the petitioner presented the federal constitutional question to the Court of Appeals on the way back, so to speak, from the Tennessee Supreme Court for three reasons:

(1) The Tennessee Supreme Court had already, by that time, in effect, affirmed the original action of the Court of Appeals (even to the extent of failing to disturb the remittitur notwithstanding respondent's cross-petition for certiorari) and, therefore, the issue was at least moot, and

(2) When the issue was thus obliquely presented to the Court of Appeals, it was not and could not have been, in an effort to obtain substantive relief but only to obtain a procedural remedy, i. e., a stay of execution, and

(3) While it may be true that to this limited extent the Court of Appeals expressed an opinion on the purported federal question, one could scarcely expect that it would hold that there was such a question when the Tennessee Supreme Court had found no cause to take jurisdiction on that or any other issue, when petitioned three times to do so. It should be noted that a similar application to this Court in this case for a stay of execution, predicated on the alleged federal issues, was denied by the Honorable Justice Potter Stewart on the 14th of May, 1964.

We respectfully demur to petitioner's description of the sequence of proceedings allegedly setting up the manner in which the federal question was raised (petition, pages 7 and 8). An examination of the grounds for the motion for a new trial in the trial court and the assignments of error in the Court of Appeals shows that, unlike the assignments of error in the Tennessee Supreme Court, they make no reference to the present alleged denial of constitutional rights. Assignment of Error No. 2 in the Court of Appeals alleged violation of due process of law on a ground foreign to the present petition and now abandoned by petitioner. **Langford v. Vanderbilt University**, cited at page 8 of the petition, is not in point since it was there held that the demurrer put in issue the validity of the statute and further that the Supreme Court may of its own motion question the constitutionality of a statute, but the latter rule has **never** been applied to a ruling on a question of common law.

The petitioner having urged upon the Tennessee Supreme Court its right and obligation to take jurisdiction

of a federal question and that court having on three occasions declined to accept such jurisdiction, notwithstanding its having all material elements in the case before it, we feel that it ill behooves the petitioner to assert that it is being deprived of its property without due process of law. Had there been any error in the judgment of the Court of Appeals, the Tennessee Supreme Court had more than the customary opportunity to take note of it. We refer the Court to the decision of the Tennessee Supreme Court in **Powers v. L. & N. Railroad Co.**, 194 S. W. 2d 241, at 242, wherein it is held:

> "We think this case presents no more than factual questions of negligence and contributory negligence upon which there has been a concurrence by the jury, the trial judge and the court of appeals. No rule is more firmly established in Tennessee than that such concurrence, if supported by material evidence, is binding on this Court."

In the absence of an affirmative showing that the jury found liability under a count of the declaration unsupported by evidence, a judgment will not be reversed, the presumption being that the judgment appealed from is regular and correct: **City Transportation Corporation v. Seckler** (1949), 32 Tenn. App. 661, 225 S. W. 2d 288; **Thoni v. Hayborn**, 37 Tenn. App. 56, 260 S. W. 2d 376, at 378; **General Motors Corporation v. Dodson**, 47 Tenn. App. 438, 338 S. W. 2d 655; **Ori v. St. Louis-San Francisco Railway Co.** (1961), 48 Tenn. App. 448, 348 S. W. 2d 809; **Hammons v. Walker Hauling**, 196 Tenn. 26, 263 S. W. 2d 753; **Tennessee Central Railway Co. v. Umenstetter**, 155 Tenn. 235, at 237.

We have reviewed the cases cited at page 12 of the petition, and with respect to the cases of **Smart v. Embry**, 208 Tenn. 686, 348 S. W. 2d 322 and **Rice-Stix Dry Goods Company v. Self**, 20 Tenn. App. 498, 101 S. W. 2d 132, we

find nothing to support petitioner's discussion of the law of agency. However, with respect to **Gulf Refining Company v. Huffman,** 155 Tenn. 580, 297 S. W. 199 and **Knight v. Hawkins,** 26 Tenn. App. 448, 173 S. W. 2d 163, there is much to support the decision of the Court of Appeals in the case at bar, particularly in the light of the evidence cited on page 3 of this brief. In the **Huffman** case at page 587, it is said:

> "It is the reservation of the right of control of essential details, either express or implied, rather than the actual exercise of the right, that distinguishes the relationship of responsible principal from that of an employer of an independent contractor. 'In every case the decisive question is, had the defendant the right to control in the given particular the conduct of the person doing the wrong?' "

The case of **Powell v. Virginia Construction Co.,** 88 Tenn. 692, 13 S. W. 391, is of no assistance to petitioner.

We similarly feel that the decisions of this Court, cited on page 12 of petitioner's brief, serve to reinforce the opinion of the Tennessee Court of Appeals. We refer to **Denton v. Yazoo and Mississippi Valley Railroad Company,** 284 U. S. 305, 308, 76 Ed. 310, 311, 52 S. Ct. 141. On the second page of this opinion this Court said:

> "When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions, a few only of which need be cited."

And in **Standard Oil Company v. Anderson,** 212 U. S. 215, 53 L. Ed. 480, 29 S. Ct. 252, it is said:

"One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation."

CONCLUSION.

We urge that no error was committed by either the trial judge or the Court of Appeals in the matters here involved. The alleged federal questions were never properly and seasonably raised, and there appears to be no ground for granting the writ. Respondent, therefore, suggests that the petition for writ of certiorari be denied.

H. KEITH HARBER,
Attorney for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 254

DIXIE PORTLAND FLOUR MILLS, INC.,
Petitioner,

vs.

STANIFER G. BYRD,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Tennessee, Eastern Section

REPLY TO BRIEF IN OPPOSITION

REASONS FOR REPLY.

Respondent has misunderstood the concept of the Questions Presented in the Petition and reply is necessary to correct his concept and to correct respondent's Statement of alleged "undisputed facts" which are either disputed facts or erroneously assumed facts.

The essence of the error in respondent's concept of the Questions Presented in the Petition is that he argues that petitioner attacks the actions of the trial judge in instructing the jury as the foundation for the abridgement of petitioner's constitutional rights. This is incorrect. Denial of

the petitioner's constitutional rights as stated in the Petition for Certiorari filed with the Supreme Court of Tennessee and with this Court, clearly established that these rights were first abridged by the action of the Court of Appeals of Tennessee and it is the judgment of that court which is sought to be reviewed. An integral part of the review of the judgment of that court is review of the action of the Supreme Court of Tennessee on Petition for Writ of Certiorari, Petition for Rehearing, and Application for Special Leave to File a Second Petition for Rehearing.

It is the inescapable duty of an intermediate court of review to apply the law of a state as expressed by the highest court of that state. It is also the right of litigants and their counsel to anticipate such application of the law. Application of the law by such courts in so radical and unforeseeable a manner as to rupture the outermost boundaries of the law as established by the recorded jurisprudence of this country warrants review by superior courts in which such law was promulgated. By the mere declaration that denial of certiorari denotes approval of the judgment below but not the basis upon which it was founded, can a state supreme court blindfold itself to the denials of petitioner's substantive federal constitutional rights contained in the Opinion of the Court of Appeals and inexorably threaded through the law of the case, without there being a violation of a litigant's constitutional rights in the state supreme court? Where the radical and unforeseeable application of a law by intermediate courts of appeal abridges federal constitutional rights, and those rights are asserted, a state court of last resort from whom relief is prayed, cannot, by its denial to grant certiorari, escape review of its action by this Court.

This is particularly true in Tennessee where the pronouncement of the court of last resort is that their denial of certiorari has only one meaning—that they agree with

the judgment of the Court of Appeals and such denial does not mean that they agree with the Opinion of the Court of Appeals upon which the judgment was founded. The oddity of this pronouncement is particularly apparent in the case here presented. It is the opinion of the Court of Appeals that forms the legal lifeline to its judgment. Petitioner is well aware that this Court reviews judgments, not opinions. However, that has never been taken to mean that the postulates of the opinion essential to the validity of the judgment could not abridge a litigant's constitutional rights.

Where the Opinion of the Court of Appeals premises its judgment upon their expression:—that because the accused, an innkeeper, told an invitee that he should keep his shotgun in the garage and the invitee, in storing the weapon, kills a third person by its negligent discharge, the innkeeper thus becomes a co-principal because of his instruction; would this Court allow affirmation of a judgment of negligent homicide, by such Court of Appeals, and then permit the state supreme court to deny certiorari to review federal constitutional questions raised because of the capricious application of the law to the case by the Court of Appeals? Such rationale is with a distinction but without a difference to the rationale of the judgment here.

The paradox of the Tennessee Supreme Court's announced effect of their denial of certiorari, in any given case, is contained in what they fail to say—if the Tennessee Supreme Court approves the judgment of a Court of Appeals by denying certiorari, what do they review to reach their approval of that judgment? If they review only what was presented to the Court of Appeals so that questions of correctness of the judgment follow parallel lines, then, perforce, petitioner had absolutely no review of the federal constitutional questions raised by the action of the intermediate court of appeals. Conversely, if they

review not only what was presented to the Court of Appeals but also that which is contained in the Petition for Certiorari before them, they have substantively and effectively accepted and reviewed the federal constitutional questions presented and denied petitioner relief by the announced approval of the intermediate court judgment. In either case, jurisdiction rests with this Court to review.

Respondent states that "the theory and insistence of each party to the suit as to the factual occurrence was given to the jury in the Court's charge (R. 1127-28)." This is less than a correct statement. There is a significant difference with respect to the manner in which the jury was instructed as to plaintiff's theory and as to defendant's theory. Failure of the Court of Appeals to reverse on that ground alone is the basis of petitioner's third Question Presented. The pertinent portions of the charge are set out below from the Record, pages 1127-28:

> "However, the Court instructs you that if you believe the theory and insistence of the plaintiff as to the *way and manner** in which this accident occurred, to be true from all of the proof as to all of the defendants . . . then the defendants would be guilty of negligence and your verdict would be in favor of plaintiff against all of the defendants."
>
> ". . . If you find that the theory and insistence of the defendants are true from all of the evidence or if you find that the evidence introduced by the plaintiff in support of its theory equally balances with the evidence introduced by the defendants in support of their insistence, then plaintiff's action against that defendant or those defendants would fail . . ."

This portion of the charge makes it demonstrably clear that the jury was compelled to find against all defendants if the *way and manner* in which the accident occurred was

* Emphasis supplied throughout.

found by them to be true. As discussed in the Petition, there was no dispute by any of the parties litigant as to the *way and manner* in which the accident occurred. The second paragraph of the instruction eliminates the words, "*way and manner* in which the accident occurred," when submitting the theory and insistence of the defendants to the jury. The theory and insistence of the defendants was drawn in issue and was in conflict upon *why* the accident occurred, not *how*. All parties agreed as to *how* it occurred. The jury was also instructed to find negligence from the mere happening of the accident, contrary to Tennessee law. The instruction thus contained the inherent vice of being a verdict directing instruction which contained a misstatement of the Tennessee law. As stated in the Petition, this error necessitated reversal under controlling Tennessee decisions and failure of the Court of Appeals to reverse, consistent with the rights of the petitioner to receive a trial in accordance with the settled course of judicial proceedings in Tennessee, is the action which abridged constitutional rights with respect to the third Question Presented.

The Statement in respondent's Brief avers that agency was proven by factual evidence. This is incorrect. The only aura of agency contained in the Record is an instruction as to the area to be used for parking which was given by petitioner's employee to the co-defendant Johnson on the occasion of his first entry upon petitioner's premises months prior to that day on which the accident occurred. No principle of agency, domestic or foreign, permits the application of *respondeat superior* under such circumstances.

The Statement continues with the averment that petitioner did not comply with ordinance regulations with respect to safety and that petitioner failed to install wheel stops which was an additional violation of applicable city ordinances. These statements ar in error. The respective

ordinances involved contain no safety requirements affecting the petitioner's use of the property on the day on which the accident occurred. The applicable city ordinances with respect to stops or barriers apply exclusively to the maintenance of a *public* parking lot. The height and width of the wall involved is not germane to the issue, nor does it constitute a violation of any duty owed by the petitioner.

Respondent concludes that petitioner offered no defense to his evidence. Petitioner does not understand the significance of this statement in the light of respondent having the burden of proof of petitioner's negligence, even under the law of Tennessee.

The Reply does not touch upon respondent's argument because that argument is material only to the Questions Presented in respondent's Brief which assume the facts contained in the Statement. The error of the material facts contained in the Statement reduces the Questions Presented to irrelevant expressions and, concomitantly, the argument lacks materiality to the issues raised in the Petition.

CONCLUSION.

For the reasons set forth in the Petition and Reply, petitioner again prays that this Court issue its writ of certiorari.

George P. Bowie
Attorney for Petitioner

Of Counsel:
John S. Carriger
John D. Schneider